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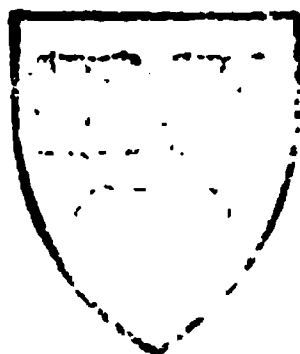
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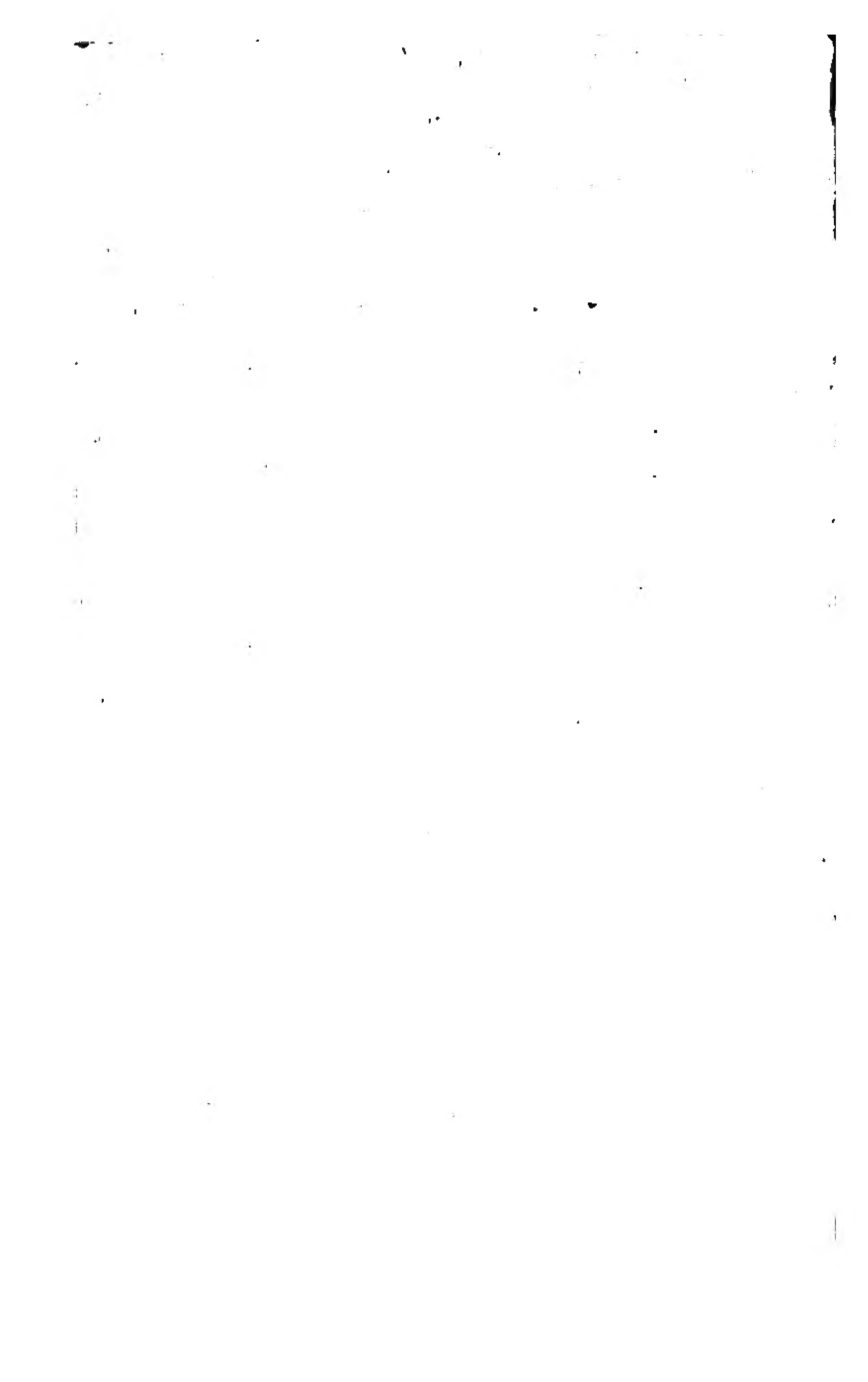


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VOL. 74—IOWA RE-
PORTS.

77	586
74	383
75	255
74	389
75	311
74	407
75	189
77	312
74	409
75	698
75	699
74	543
75	222
74	550
75	108
75	401
77	309
77	369
74	580
75	125
74	612
74	696
74	637
74	369
74	648
75	101
74	644
77	197

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Chicago. (Patent
applied for.)



July

3

REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF IOWA.

E. C. EBERSOLE,
REPORTER.

VOL. XVI.
BEING VOLUME LXXIV OF THE SERIES.

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JUDGES AND OFFICERS OF THE SUPREME COURT.

HON. WILLIAM H. SEEVERS, Oskaloosa, Chief Justice.
HON. JOSEPH R. REED, Council Bluffs,
HON. JAMES H. ROTHROCK, Cedar Rapids,
HON. JOSEPH M. BECK, Fort Madison,
HON. GIFFORD S. ROBINSON, Storm Lake. } JUDGES.

CLERK—GILBERT B. PRAY, Webster City.

ATTORNEY GENERAL—A. J. BAKER, Centerville.

REPORTER—E. C. EBERSOLE, Toledo.

JUDGES OF THE COURTS

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

DISTRICT COURT.

- 1ST DISTRICT—J. M. CASEY, Fort Madison; C. H. PHELPS, Burlington.
2D DISTRICT—H. C. TRAVERSE, Bloomfield; DELL STUART, Charlton; CHAS. D. LEGGETT, Fairfield.
3D DISTRICT—JOHN W. HARVEY, Leon; R. C. HENRY, Mt. Ayr.
4TH DISTRICT—CHARLES H. LEWIS, Cherokee; GEO. W. WAKEFIELD, Sioux City; SCOTT M. LADD, Sheldon.
5TH DISTRICT—J. H. HENDERSON, Indianola; O. B. AYERS, Knoxville; A. W. WILKINSON, Winterset.
6TH DISTRICT—J. KELLEY JOHNSON, Oskaloosa; DAVID RYAN, Newton; W. R. LEWIS, Montezuma.
7TH DISTRICT—O. M. WATERMAN, Davenport; W. F. BRANNAN, Muscatine; ANDREW HOWAT, Clinton.
8TH DISTRICT—S. H. FAIRALL, Iowa City.
9TH DISTRICT—JOSIAH GIVEN, W. F. CONRAD, and MARCUS KAVANAGH, JR., Des Moines.
10TH DISTRICT—C. F. COUCH, Waterloo; J. J. NEY, Independence; D. J. LINEHAN, Dubuque.
11TH DISTRICT—D. R. HINDMAN, Boone; JOHN L. STEVENS, Ames; S. M. WEAVER, Iowa Falls.
12TH DISTRICT—JOHN C. SHERWIN, Mason City; GEORGE W. RUDDICK, Waverly.
13TH DISTRICT—L. O. HATCH, McGregor; C. T. GRANGER, Waukon.
14TH DISTRICT—GEORGE H. CARR, Emmetsburg; LOT THOMAS, Storm Lake.
15TH DISTRICT—A. B. THORNELL, Sidney; GEORGE CARSON, Council Bluffs; H. E. DEEMER, Red Oak; C. F. LOOFBOUROW, Atlantic.
16TH DISTRICT—J. P. CONNER, Denison; J. H. MACOMBER, Ida Grove.
17TH DISTRICT—L. G. KINNE, Toledo.
18TH DISTRICT—J. D. GIFFEN, Marion; J. H. PRESTON, Cedar Rapids.
-

SUPERIOR COURT.

CEDAR RAPIDS—JOHN T. STONEMAN.
COUNCIL BLUFFS—E. E. AYLESWORTH.
KEOKUK—HENRY BANK, JR.
CRESTON—GEO. P. WILSON.

TABLE OF CASES

REPORTED IN THIS VOLUME.

A			
Acton, Coffman v.....	147	Co., Conners v.....	383
Acton v. Coffman.....	17	Burlington, C. R. & N. Ry.	
Anderson v. Peterson.....	482	Co., Wait v.....	207
Asbach v. Chicago, B. & Q.		Burlington Ins. Co., Worsley	
Ry. Co.....	248	v.....	464
Aultman & Taylor Co. v.		Burlington Opera-House Co.,	
Trainer	417	Guest v.....	457
Axtell, Howes v.....	400	Burlington & W. Ry. Co.,	
		Bloomfield v.....	607
B		Burrows, Goodnow v. 251. 256, 758	
Baker, State v.....	760	Butterfield v. Wilton Academy	515
Ball v. Keokuk & N. W. Ry.			
Co	132	C	
Ball v. Van Riper.....	146	Cadwell v. Dullaghan.....	239
Barber v. Barber.....	301	Campbell, Finnegan v.....	158
Barber, Cowles v.....	71	Campbell v. Manderscheid...	708
Barringer, Stanley v.....	34	Card, Warbasse v.....	306
Beach v. Donovan.....	543	Carter, Hall v.....	364
Beauchamp, Neff v.....	92	Cedar Rapids, I. F. & N. W.	
Bell v. Chicago, B. & Q. Ry.		Ry. Co., Shively v.....	169
Co	343	Central Iowa Ry. Co., Raben	
Bennett, State v.....	757	v	732
Billingsly & Nanson Commis-		Central Iowa Ry. Co., Ray-	
sion Co., Roose v.....	51	burn v.....	637
Birmingham, State v.....	407	Central Iowa Ry. Co., Winter	
Blair v. Blair.....	311	v	448
Blake v. Rourke.....	519	Chamberlin, State ex rel.	
Blanchard, State v.....	628	Braden v.....	266
Bloomfield v. Burlington &		Chicago, B. & P. Ry. Co.	
W. Ry. Co.....	607	Griffith v.....	85
Board of Equalization of Des		Chicago, B. & Q. Ry. Co.,	
Moines, Equitable Life Ins.		Asbach v.....	248
Co. v.....	178	Chicago, B. & Q. Ry. Co.,	
Bolinger, Shear v.....	757	Bell v.....	343
Bothwell v. Farwell.....	324	Chicago, B. & Q. Ry. Co.,	
Branscombe, Taylor v.....	531	Platt v.....	127
Brewster v. Reel.....	506	Chicago, M. & St. P. Ry. Co.,	
Brown v. State Ins. Co.....	428	Fisk v.....	424
Brunning, Schaben v.....	102	Chicago, M. & St. P. Ry. Co.,	
Bruns, Sweny v.....	701	Kuhn v.....	137
Brush, Serrin v.....	489	Chicago, M. & St. P. Ry. Co.,	
Buck v. Holt.....	294	Wooster v.....	593
Burley, Morris v.....	45	Chicago & N. W. Ry. Co.,	
Burlington, City of, Grimes v.	123	Crane v.....	330
Burlington, C. R. & N. Ry.		Chicago, R. I. & P. Ry. Co.,	
Co., Clements v.....	442	Deeds v.....	154
Burlington, C. R. & N. Ry.			

Chicago, R. I. & P. Ry. Co., Sullens v.....	659	Des Moines, City of, Larsh v.	512
Chicago, St. P., M. & O. Ry. Co., Reed v.....	188	Des Moines, City of, Lind- say v.....	111
Chicago, St. P. & K. C. Ry. Co., Humeston & S. Ry. Co. v.....	554	Des Moines County, Shaw v..	679
City of Burlington, Grimes v.	123	Des Moines Ins. Co., Mat- tocks v.....	233
City of Creston v. Nye.....	369	Des Moines St. Ry. Co. v. Des Moines B. G. St. R. R. Co..	585
City of Davenport, Dittoe v..	66	Determann v. Leuhrsmann...	275
City of Des Moines, Dickens v.	216	Deuble, State v.....	509
City of Des Moines, Haskell v.	110	Dickens v. City of Des Moines	216
City of Des Moines, Hunter v.	215	Dillon, State v.....	653
City of Des Moines, Larsh v.	512	Dittoe v. City of Davenport..	66
City of Des Moines, Lindsay v.	111	Donovan, Beach v.....	543
Clancy v. Kenworthy.....	740	Douglas, Reed v.....	244
Clapp v. Trowbridge.....	550	Douglas v. Smith.....	468
Clayton, State v.....	759	Dow, State v.....	141
Clements v. Burlington, C. R. & N. Ry. Co.....	442	Dows v. Dale.....	108
Clinton Nat. Bank v. Stude- mann.....	104	Dullaghan, Cadwell v.....	239
Clyde v. Peavy.....	47	Duncan, Wilson v.....	491
Coad, Patterson Educational Inst. v.....	710	E	
Cobb, Windsor v.....	709	Eberts, Ellett v.....	597
Coenen v. Staub.....	82	Eiseman v. Hawkeye Ins. Co.,	11
Coffman, Acton v.....	17	Ellett v. Eberts.....	597
Coffman v. Acton.....	147	Ellison v. Harrison County..	494
Conable, Corliss v.....	58	Equitable Life Ins. Co. v. Board of Equalization of Des Moines.....	178
Conlee Lumber Co. v. Meyer..	403	Equitable Mut. Life & Endow. Ass'n, Garretson v.....	419
Conley v. Zerber.....	699	Everling v. Holcomb.....	722
Connors v. Burlington, C. R. & N. Ry. Co.....	383	F	
Cook v. Federal Life Ass'n...	746	Farlee, State v.....	451
Cook, Paddleford v.....	433	Farmer, Ind. District of Fair- field v....	744
Corliss v. Conable.....	58	Farmers' Ins. Co., Hunt v....	231
Cowan, State v.....	53	Farmers' & Traders' Bank, Wasson v.....	764
Cowles v. Barber.....	71	Farwell, Bothwell v.....	324
Council Bluffs Insurance Co., Feshe v.....	676	Federal Life Ass'n, Cook v...	746
Craig v. Hasselman.....	538	Feshe v. Council Bluffs Ins. Co.....	676
Crane v. Chicago & N. W. Ry. Co.....	330	Finnegan v. Campbell.....	158
Crane, Ross v.....	375	First Nat. Bank of Storm Lake v. Harwick.....	227
Creston, City of, v. Nye.....	369	Fisk v. Chicago, M. & St. P. Ry. Co.....	424
D		Flournoy, Judge v.....	164
Dale, Dows v.....	108	Fowler v. Town of Straw- berry Hill.....	644
Danner v. Hotz.....	389	G	
Davenport, City of, Dittoe v.	66	Galpin v. Galpin.....	454
Davis v. Kimball.....	84	Gamble v. Mullin.....	99
Davis, Lamb v.....	719	Garretson v. Equitable Mut. Life & Endow. Ass'n.....	419
Davis, State v.....	578	Goodnow v. Burrows. .251, 256,	758
DeCamp v. Sioux City.....	392	Goold v. Lyon County.....	95
Deeds v. Chicago, R. I. & P. Ry. Co.....	154	Granger, McLane v.....	152
Des Moines B. G. St. R. R. Co., Des Moines St. Ry. Co., v.....	585		
Des Moines, City of, Dickens v.	216		
Des Moines, City of, Haskell v.	110		
Des Moines, City of, Hunter v.	215		

CASES REPORTED.

7

Gregg, Halley v.....	563
Griffin v. Harriman.....	436
Griffin v. Tuttle.....	219
Griffith v. Chicago, B. & P. Ry. Co	85
Grimes v. City of Burlington.	123
Guest v. Burlington Opera- House Co.....	457
Guggerty, Riordan v.....	688

H

Hall v. Carter.....	364
Hall v. Stennett.....	279
Halley v. Gregg.....	563
Hanners v. McClelland.....	318
Harl v. Pottawattamie County Mut. Fire Ins. Co.....	39
Harriman, Griffin v.....	436
Harrison County, Ellison v...	494
Harrison County, Missouri Valley & Blair Ry. & Bridge Co. v.....	283
Hart v. Hart.....	487
Harwick, First Nat. Bank of Storm Lake v.....	227
Haskell v. City of Des Moines	110
Haskins, Heathcote v....	566, 570
Hasselman, Craig v.....	538
Hastings, State v.....	574
Hawkeye Ins. Co., Eiseman v.	11
Hawkeye Ins. Co., Lang v...	673
Hawkeye Ins. Co., Wilson v.	212
Heathcote v. Haskins....	566, 570
Helt v. Smith.....	667
Henderson, McDonnell v	619
Hennessy, Jean v.....	348
Hix, Norris v.....	524
Holcomb, Everling v.....	722
Holt, Buck v.....	294
Homire v. Rodgers.....	395
Hotz, Danner v.....	389
Howes v. Axtell.....	400
Humeston & S. Ry. Co. v. Chicago, St. P. & K. C. Ry. Co.....	554
Hunt v. Farmers' Ins. Co....	231
Hunter v. City of Des Moines	215
Hutchins, State v.....	20

I

Ill, State v.....	441
Ind. District of Fairfield v. Farmer.....	744
In re Van Brocklin's Estate..	412
In re Will of Murfield.....	479
Iowa Construction Co. v. Mar- shall County.....	24
Iowa Homestead Co., Litch- field v.....	758
Irwin v. Yeager.....	174
Israel Bros., Salm v.....	314

J

Jaffray, Teabout v.....	28
James, Smith v.....	462
Jamison, State v.....	602, 613
Jean v. Hennessy.....	348
Jenkins, Watkins v.....	749
Johnson v. Leffingwell.....	114
Jones, Snedaker v.....	235
Jordan v. Wapello District Court.....	762
Judge v. Flournoy.....	164
Judge v. Kahl.....	486
Judge v. O'Connor.....	166

K

Kahl, Judge v.	486
Kaiser, State v.....	761
Kavanagh, Wells v.....	372
Keasling, State v.....	528
Keegan, State v.....	145
Kelly, State v.....	589
Kenworthy, Clancy v.....	740
Keokuk County, Schulte v...	292
Keokuk & N. W. Ry. Co., Ball v.....	132
Killmer v. Wuchner.....	359
Kimball, Davis v.....	84
King, LaRue v.....	288
King, State v.....	763
Kipp, Norris v.....	444
Kirkpatrick, State v.....	505
Koltze v. Messenbrink.....	242
Kraner, State v.....	760
Kuhn v. Chicago, M. & St. P. Ry. Co.....	137

L

Lamb v. Davis.....	719
Lang v. Hawkeye Ins. Co....	673
Larsh v. City of Des Moines..	512
LaRue v. King.....	288
Leathers v. Ross.....	630
Leffingwell, Johnson v.....	114
Leuhrsmann, Determann v...	275
Lindsay v. City of Des Moines	111
Litchfield v. Iowa Homestead Co	758
Little, Peterson v.....	223
Logan v. Samsel.....	87
Lundburg, McCormick v....	558
Lyon County, Gould v.....	95

M

Maggarell v. Maggarell.....	378
Maher, State v.....	77, 82
Manderscheid, Campbell v...	708
Manley, State v.....	561
Marshall County, Iowa Con- struction Co. v.....	24
Marshall County, Merrill v...	24

Mattocks v. Des Moines Ins. Co.	283
Maxwell, Thompson v.	415
McClelland, Hanners v.	318
McCormick v. Lundburg	558
McDonnell v. Henderson	619
McLane v. Granger	152
McReynolds v. McReynolds ..	89
Meeker v. Meeker	352
Melhop v. Tathwell	571
Merkley, State v.	695
Merrill v. Marshall County ...	24
Merritt, Wertz v.	688
Messenbrink, Koltze v.	242
Meyer, Conlee Lumber Co. v.	403
Michaels, Parker v.	209
Michel v. Michel	577
Miles v. Wikel	712
Mills v. Penny	172
Missouri Valley & Blair Ry. & Bridge Co. v. Harrison County	283
Moore, Sims v.	497
Morris v. Burley	45
Mullenhoff, State v.	271
Mullin, Gamble v.	99
Murfield, In re Will of	479

N

Names v. Names	218
Neff v. Beauchamp	92
Norris v. Hix	524
Norris v. Kipp	444
Norton v. Norton	161
Nye, City of Creston v.	369

O

O'Connor, Judge v.	166
---------------------------------	-----

P

Paddleford v. Cook	433
Parker v. Michaels	209
Patterson Educational Inst. v. Coad	710
Peavy, Clyde v.	47
Penny, Mills v.	172
People's Nat. Bank of Independence, Plummer v.	731
Peterson, Anderson v.	482
Peterson v. Little	223
Platt v. Chicago, B. & Q. Ry. Co.	127
Plummer v. People's Nat. Bank of Independence	731
Pomeroy v. Trowbridge	560
Porter, State v.	623
Pottawattamie County Mut. Fire Ins. Co., Harl v.	89

R

Raben v. Central Iowa Ry. Co.	782
Rainsbarger, State v.	196, 589
Rayburn v. Central Iowa Ry. Co.	687
Reed v. Chicago, St. P., M. & O. Ry. Co.	188
Reed v. Douglas	244
Reel, Brewster v.	506
Reid v. Reid	681
Reyelts, State v.	499
Richardson v. Woodring	149
Riordan v. Guggerty	688
Rodgers, Homire v.	895
Roose v. Billingsly & Nanson Commission Co.	51
Ross v. Crane	875
Ross, Leathers v.	680
Rourke, Blake v.	519
Rowe, Stoddard v.	670

S

Salm v. Israel Bros.	314
Samsel, Logan v.	87
Schaben v. Brunning	102
Schaffer, State v.	704
Schulte v. Keokuk County ...	292
Serrin v. Brush	489
Shank, State v.	649
Shannon v. Tama City	22
Shaw v. Des Moines County ..	679
Shear v. Bolinger	757
Shively v. Cedar Rapids, I. F. & N. W. Ry. Co.	169
Sims v. Moore	497
Sioux City, DeCamp v.	392
Smith, Douglas v.	468
Smith, Helt v.	667
Smith v. James	462
Smith, State v.	580
Snedaker v. Jones	235
Stanley v. Barringer	34
State v. Baker	760
State v. Bennett	757
State v. Birmingham	407
State v. Blanchard	628
State v. Clayton	759
State v. Cowan	53
State v. Davis	578
State v. Deuble	509
State v. Dillon	653
State v. Dow	141
State v. Farlee	451
State v. Hastings	574
State v. Hutchins	20
State v. Ill	441
State v. Jamison	602, 618
State v. Kaiser	761

CASES DETERMINED.

9

State v. Keasling	528
State v. Keegan	145
State v. Kelly	539
State v. King	763
State v. Kirkpatrick	505
State v. Kraner	760
State v. Maher	77, 82
State v. Manley	561
State v. Merkley	695
State v. Mullenhoff	271
State v. Porter	623
State v. Rainsbarger	196, 539
State v. Reyelts	499
State v. Schaffer	704
State v. Shank	649
State v. Smith	580
State v. Staton	762
State v. Stewart	336
State v. Tierney	237
State v. Thompson	119
State v. Trout	545
State v. Waltz	610
State v. Wambold	605
State v. Ullins	768
State ex rel. Braden v. Cham- berlin	266
State Ins. Co., Brown v.	428
Staton, State v.	762
Staub, Coenen v.	82
Stennett v. Hall	279
Stewart, State v.	336
Stoddard v. Rowe	670
Strawberry Hill, Town of, Fowler v.	644
Strouse, Town of Waukon v. ..	547
Studeman, Clinton National Bank v.	104
Sullens v. Chicago, R. I. & P. Ry. Co.	659
Supervisors of Lyon County, Van Wagenen v.	716
Sweny v. Bruns	701

T

Tama City, Shannon v.	22
Taylor v. Branscombe	534
Tathwell, Melhop v.	571
Teabout v. Jaffray	28
Thatcher v. Union Scale Co. ..	117
Thompson v. Maxwell	415
Thompson, State v.	119
Tierney, State v.	237
Town of Strawberry Hill, Fowler v.	644

Town of Tama City, Shan- non v.	22
Town of Waukon v. Strouse ..	547
Trainer, Aultman & Taylor Co. v.	417
Trowbridge, Clapp v.	550
Trowbridge, Pomeroy v.	550
Trout, State v.	545
Tuttle, Griffin v.	219

U

Ullins, State v.	768
Union Scale Co., Thatcher v. ..	117

V

Van Brocklin, In re Estate of	412
Van Riper, Ball v.	146
Van Wagenen v. Supervisors of Lyon County	716

W

Wait v. Burlington, C. R. & N. Ry. Co.	207
Waltz, State v.	610
Wambold, State v.	605
Wapello District Court, Jor- dan v.	762
Warbasse v. Card	306
Warfield v. Warfield	184
Wasson v. Farmers' & Traders' Bank	764
Watkins v. Jenkins	749
Waukon, Town of, v. Strouse ..	547
Wells v. Kavanagh	372
Wertz v. Merritt	688
Wikel, Miles v.	712
Wilson v. Duncan	491
Wilson v. Hawkeye Ins. Co. ..	212
Wilton Academy, Butter- field v.	515
Windsor v. Cobb	709
Winter v. Central Iowa Ry. Co.	448
Woodring, Richardson v.	149
Wooster v. Chicago, M. & St. P. Ry. Co.	598
Worsley v. Burlington Ins. Co. ..	464
Wuchner, Killmer v.	359

Y

Yeager, Irwin v.	174
-----------------------	-----

Z

Zerber, Conley v.	699
------------------------	-----

REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA
AT
DES MOINES, DECEMBER TERM, A. D. 1887,
IN THE FORTY-SECOND YEAR OF THE STATE.

PRESENT :

HON. WILLIAM H. SEEVERS, CHIEF JUSTICE.	
HON. JOSEPH R. REED,	}
HON. JAMES H. ROTHROCK,	
HON. JOSEPH M. BECK,	
HON. GIFFORD S. ROBINSON,	
	JUSTICES.

EISEMAN V. THE HAWKEYE INSURANCE COMPANY.

1. **Fire Insurance:** INSTRUCTION: ERROR CURED. In an action upon a policy of fire insurance, the court erroneously instructed the jury, in stating the issues, that the defendant in its answer admitted that a part of the insured property was injured or destroyed by fire. *Held* that this error was without prejudice, because, in two other instructions, the jury were informed that, to authorize a verdict for the plaintiff, they must find from the evidence that the property, or a part of it, was injured or destroyed by fire.

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107	83

74	11
108	10

Eiseman v. The Hawkeye Ins. Co.

2. ——— : ——— : NOTICE OF LOSS AS REQUIRED BY THE POLICY. In such case, an instruction to the effect that, to entitle plaintiff to recover, he must prove that he "gave defendant notice of the fire, and the loss thereunder, as required by the terms of the policy," held not to dispense with the necessity of *proof* of loss, since proof of loss must accompany such notice, under the terms of the policy.
3. ——— : INSTRUCTIONS AS TO WAIVER NOT PLEADED. If plaintiff, in an action upon a policy of fire insurance, relies upon a waiver by the company of conditions of the policy as an excuse for his failure to perform them, he must plead such waiver. (See cases cited in opinion). And so, where the company set up as a defence a breach by the insured of certain conditions of the policy, and plaintiff did not, either in his petition or by reply, raise the issue of waiver, it was error for the court to instruct the jury as though such issue were in the case.

Appeal from Pottawattamie District Court.—HON. A.
B. THORNELL, Judge.

FILED, MARCH 7, 1888.

ACTION upon a policy of insurance to recover the value of the property insured, which was destroyed by fire. There was a judgment on a verdict for plaintiff. Defendant appeals.

Phillips & Day and *Geo. R. Sanderson*, for appellant.

Wright, Baldwin & Haldane, for appellee.

BECK, J.—It is necessary to consider but a few of the numerous errors assigned and argued by appellant. The facts upon which the respective objections to the judgment are based will be stated in connection with the discussion of each.

I. The district court, in stating to the jury the issues involved in the case, informed the jury that defendant admitted in its answer that a part of the goods and property covered by the policy was injured or destroyed by the fire. It is insisted that this is an erroneous statement of the

1. FIRE INSUR-
ANCE: INSTRU-
CTION: ERROR
CURED.

effect of the pleadings. The defendant, in its answer, admits that a fire occurred in the building wherein the insured goods were situated when the policy was issued, but "upon information and belief" denies that any part of the property was injured by the fire. The pleadings of the defendant were verified. We need not inquire whether this language of the answer ought to be taken as a denial of the allegation as to the destruction of the property, for the reason that, if the instruction just referred to be regarded as erroneous, it did not, in our opinion, work prejudice to defendant, for the reason that in two other instructions the jury were informed that, to authorize a verdict for plaintiff, they must find from the evidence that the property or a part of it was injured or destroyed by fire. We think by no possibility could the jury have been misled, and thereby found the loss or injury of the goods upon the pleadings. The two explicit instructions were doubtless understood by them and followed. As they were directed to find the destruction or injury to the goods from the evidence, they doubtless did not consider the statement complained of as nullifying the direction of the other instructions.

II. The court, in the first instruction, directed the jury that, to entitle plaintiff to recover, they must find, among other things, that plaintiff "gave 2. —: —: notice of loss as required by the policy. defendant notice of the fire and the loss thereunder as required by the terms of the policy." Counsel insist that this instruction denies the necessity of proof of loss. We think differently. This condition of the policy as to notice of loss plainly implies that proof of loss shall accompany and be a part of it. Hence, notice of loss "as required by the policy" would contain what counsel call "proof of loss."

III. The court gave the jury the following instructions. They fully state the facts and rules of law applicable thereto announced in them:

"4. The policy introduced in evidence provides that all persons having a claim under this policy for loss or

Eiseman v. The Hawkeye Ins. Co.

8. —: Instructions as to waiver not pleaded. damage, if required, shall produce books of account and other proper vouchers and extracts to be made therefrom, and be examined and reexamined under oath, by any person appointed by the company, at such time or times, and place or places, as the company or such person may require, touching all questions relating to the claim, and subscribe to the same; and until such examination is submitted to, if required, the loss shall not become payable.

“5. The above conditions of said policy are binding upon the assured. The burden is upon the defendant to show notice to said D. McGinnis requiring him to appear at a certain time and place to be so examined; but if you shall find from the evidence that such notice was served by the defendant upon D. McGinnis, the burden would then be upon said D. McGinnis to show by a preponderance of the evidence that he complied with said notice and submitted to such examination under oath, or that the defendant, by some act of its own, waived such condition of the policy. And if you shall find from the evidence that said D. McGinnis was required by the defendant, by notice served upon him, to appear at a certain time and place to be examined and reexamined under oath touching said loss, and that said D. McGinnis failed to comply therewith, the verdict must be for the defendant, unless it be shown, as above stated, that the defendant waived such condition.

“6. If you shall find that the defendant did notify said McGinnis to appear at Des Moines to submit to an examination under oath touching said loss, but that said McGinnis made excuse for not appearing at said time and place, and that defendant accepted said excuse, and then sent an agent to Council Bluffs, and at said latter place said McGinnis submitted to examination as required by the terms of said policy, then you are entitled to find that defendant waived its right under said policy requiring said McGinnis to appear for said examination at Des Moines, as required by its said

Eiseman v. The Hawkeye Ins. Co.

notice, and such waiver will also apply to any subsequent notice for reëxamination at Des Moines."

The answer of defendant pleaded as a defense the violation of the conditions stated in the instructions. The plaintiff, by failing to reply, took issue upon the facts as pleaded. No reply pleading waiver was made by the plaintiff, and the petition does not allege that the conditions of the policy, or any of them, were waived by defendant. The pleadings, therefore, presented the issue involving the facts upon which it is claimed that the conditions of the policy were violated. It is plain that, upon the pleadings, the question for the court to try and determine was this: Were the acts done by plaintiff which are alleged to constitute breaches of the conditions? But the instructions require this question to be determined: Did defendant do any acts which in law waived the performance of the conditions? The rules of pleading require the facts to be stated upon which parties base their claim to recover, or their defenses. Under this instruction, plaintiff is entitled to recover upon facts constituting a waiver. Yet nothing in the pleadings indicates that he seeks to recover upon that ground. It is a familiar rule that, when a waiver of a condition is relied upon, it must be pleaded; otherwise evidence thereof will not be regarded as excusing the performance of the conditions. *Bernhard v. Washington Life Insurance Company*, 40 Iowa, 442; *Lumbert v. Palmer*, 29 Iowa, 104; *Edgerly v. Farmers' Insurance Company*, 43 Iowa, 587; *Fauble v. Smith*, 48 Iowa, 462; *Welsh v. Des Moines Insurance Company*, 71 Iowa, 337; *Meadows v. Hawkeye Insurance Company*, 62 Iowa, 389. Counsel for plaintiff, replying to this objection, say, in effect, that the evidence in fact shows a performance of the conditions of the policy referred to in the instructions, and the district court mistakenly "called the state of facts waiver." But this explanation will not do. The defendant insisted that the conditions were not performed; the plaintiff, that they were. The court held that the jury were authorized to find a waiver. In this condition of the

Eiseman v. The Hawkeye Ins. Co.

pleadings and instructions, the jury may have found that facts, which they did not regard as performance, amounted to a waiver of performance; thus basing their verdict upon their findings on an issue not in the case.

IV. The seventh instruction is in the following language:

“7. The policy in this case provides, among other things, that if any of the property insured shall be removed, the policy shall be null and void

THE SAME. as to such property. In order to avoid any portion of its apparent liability by reason of this clause in the policy, it will not be sufficient for the defendant to show that particular articles were moved from one portion of the building to another, but it must be shown that such articles were moved from the building described in the policy, and were not in the building at the time of the fire. The policy also provides that if any portion of the insured property is kept in any other room or part or place of the building than when first insured, the policy shall be null and void as to such property. In order to avail itself of this clause in the policy, the defendant must show that articles which, at the time of the issuance of the policy, or at the time when they were first brought into the building described in the policy, were kept in some particular room, part or place of the building, were afterwards kept in some other room, part or place thereof. This provision of the policy is binding upon the assured, and if it be shown that said D. McGinnis did not comply therewith, plaintiff cannot, for the goods that were so removed, recover; that is, in order to be covered by the terms of said policy, the property described in said policy must have been kept in the room or rooms of said building where situated at the time said contract was made, and any goods that were removed therefrom are not covered by the policy—but the burden is upon the defendant to establish this defense by a preponderance of the evidence. But if you should find from the evidence that, at the time the application for insurance was made, a part of said stock was in the front room and a part

Acton v. Coffman.

thereof was stored in the room adjoining, and the agent of defendant and said McGinnis understood that all of said goods were to be sold in the front room of said building, and said goods were moved back and forth between said rooms only as the necessities of said business required, or for any proper purpose connected with said business, then said policy would cover said stock when contained in either of said rooms."

This instruction is erroneous on the ground that it authorized the jury to find a waiver of the condition, when no waiver was pleaded, which we have just shown cannot be done; or it substitutes an oral contract for the written one on which the suit is brought, which cannot be permitted.

Other questions discussed by counsel may not arise in a new trial. Upon some others we are not wholly agreed. These questions need not be considered. For the error in the instructions above pointed out, the judgment of the district court is

REVERSED.

ACTON V. COFFMAN.

1. **Appeal: PRACTICE: ABSTRACT NOT DENIED.** A statement made in an abstract filed by the appellee, and which is not denied, will be taken as true.
2. **— : — : NO BILL OF EXCEPTIONS.** When the evidence and rulings thereon have not been preserved by a bill of exceptions, this court cannot pass upon alleged errors in rulings on the admission of evidence, nor upon the propriety of the instructions given.
3. **Malicious Prosecution: GOOD FAITH: ADVICE OF COUNSEL: GENERAL AND SPECIAL VERDICTS.** In an action for malicious prosecution, the court instructed that defendant was not liable if, before beginning the prosecution, he (1) laid all the facts before his attorney, and (2) acted in good faith upon the opinion of such attorney, and (3) he himself believed that there was cause for the prosecution. In answers to special interrogatories, the jury found the first two conditions for defendant, but the third one was not specially submitted to them; and the general verdict was for the plaintiff. *Held* that the effect of the general verdict was that

74	17
82	695
82	700
82	710
74	17
90	146
74	17
92	714
74	17
97	598
100	544
100	641
74	17
144	99

Acton v. Coffman.

defendant did not himself believe that there was cause for the prosecution, and that this was not inconsistent with the special findings. The court, also, without specially passing upon the point, inclines to think that the instruction was a correct statement of the law.

Appeal from Pottawattamie District Court.—HON.
GEORGE CARSON, Judge.

FILED, MARCH 8, 1888.

ACTION for malicious prosecution. Trial by jury, verdict for plaintiff, judgment, and defendant appeals.

E. A. Babcock and Lyman & Hunter, for appellant.

Fremont Benjamin and A. W. Askwith, for appellee.

SEEVERS, C. J.—I. It is stated in an abstract, filed by the appellee, that no bill of exceptions was ever signed and filed. As this is not in any manner controverted, it must be deemed to be true. It follows, therefore, that, in relation to the introduction or rejection of evidence, the errors assigned cannot be considered, for the reason that there is no competent evidence before us that the rulings were made. Certain instructions were asked and refused, and such rulings are said to be erroneous, but we are unable to say that this is so, for the reason that the evidence has not been properly preserved by a bill of exceptions, and therefore we are unable to say that such instructions are applicable to, or justified by, the evidence.

II. Because of the state of the record, there is but one error assigned that can be considered, and that is that, under the special verdict, judgment should have been rendered for the defendant, notwithstanding the general verdict. The court instructed the jury as follows:

“7. If you find from the evidence that, before the defendant commenced any criminal proceedings against the plaintiff, if he did commence any, he

1. APPEAL: practice: abstract not denied.

2. — : — : no bill of exceptions.

3. MALICIOUS prosecution: good faith: advice of counsel: general and special verdicts.

Acton v. Coffman.

laid all the facts in the matter before E. A. Babcock, Esq. ; that said Babcock is an attorney at law ; that he acted in good faith upon the opinion given by said Babcock ; that he believed himself that there was cause for the prosecution,—then he is not liable in this action, and your verdict must be for the defendant.”

The following special interrogatories were submitted to the jury :

“(4) Did the defendant, Coffman, seek the advice of an attorney before he instituted the criminal proceedings complained of by plaintiff? (5) Did that attorney, with a full knowledge of the facts in the case, advise said Coffman that in his opinion a criminal suit was maintainable against this plaintiff? (6) Did defendant act on such advice in commencing the criminal proceedings in controversy herein?”

To each of these interrogatories, an affirmative answer was given by the jury, and the question is whether the facts thus found conclusively show that the general verdict is so inconsistent therewith that it must be set aside. It must be assumed that the jury followed the instructions above set out. Therefore, they must have found that, although plaintiff stated the facts to counsel and acted on the advice of counsel in commencing the criminal action, yet in doing so he did not act in good faith, or that he himself did not believe there was probable cause for the prosecution. It will be observed that the question of the good faith of the defendant, or whether he believed there was probable cause for the prosecution, was not submitted to the jury in the special interrogatories, and, therefore, the general and special verdicts are not inconsistent, and both can stand in full force. It is sufficient to say that, as the instruction above referred to was not excepted to, it constitutes the law of the case, and it was the duty of the jury to follow it, whether right or wrong ; but we incline to think it is a correct statement of the law. *Center v. Spring*, 2 Iowa, 393.

The court did not err in refusing to enter judgment for the defendant on the special verdict.

AFFIRMED.

THE STATE V. HUTCHINS.

Intoxicating Liquors: WHEN GIVING AWAY NOT CRIMINAL. A pure and simple gift of intoxicating liquor by one to another, who is not a minor, is not a criminal act; but it becomes criminal when it is intended as a subterfuge to conceal an unlawful sale, and to evade the penalties of the law. (Compare Code, secs. 1539, 1540, 1554.)

Appeal from Jones District Court.

FILED, MARCH 8, 1888.

DEFENDANT was fined before a justice of the peace upon an information charging that he did "unlawfully sell and give away" intoxicating liquors to a person named in the information. Upon appeal to the district court he was again convicted. He now appeals to this court.

Sheean & McCarn and *J. G. McConahy*, for appellant.

A. J. Baker, Attorney General, for the State.

BECK, J.—I. The district court, in effect, instructed the jury that under the statute of this state the giving away of intoxicating liquors is prohibited, and that if defendant gave to the person mentioned in the information whisky "to taste some of it," without pay or consideration to be paid by such person, it would be a gift, and authorize the conviction of defendant. The attorney general well says in his printed argument that the record discloses that "it is fully apparent that there was no subterfuge in the case. The giving was a gift. It was not a gift covertly intended to be a sale." It was simply the case of one having a bottle of whisky in his possession, after drinking himself, passing it to another who also drank. The person drinking it was not a minor, nor intoxicated, nor in the habit of becoming intoxicated.

74	80
81	587
74	20
86	299
74	20
129	522

II. Code, section 1523, prohibits the manufacture and sale of intoxicating liquors except as permitted by law. Section 1540 prohibits all persons not authorized by law to sell intoxicating liquors, "directly or indirectly, or on any pretense or by any device," or to give to any person any such liquors "in consideration of the purchase of any other property." Section 1539 declares that "it is unlawful for any person to sell or give away intoxicating liquors to a minor for any purpose whatever, except upon the written order of his parent, guardian, or family physician." It also prohibits the sale of such liquors by all persons to any person intoxicated or in the habit of becoming intoxicated. No provision of the statute, except section 1539, forbids the giving away of intoxicating liquors, except it is done as an evasion of the penalties for selling, or as a subterfuge to conceal unlawful sales. Code, section 1554, directs that "courts and jurors shall construe this chapter so as to prevent evasions, and so as to cover the act of giving as well as selling." It will be observed that this section does not declare the act of giving unlawful. The obvious purpose of the section is to provide a rule for the interpretation of other provisions which will defeat evasion of their penalties. Hence, the last clause of the section obviously directs that the statutes shall be so interpreted that the act of giving intoxicating liquors intended to evade the prohibition of their sale shall be deemed unlawful, and punished accordingly. Surely, had the legislature intended to declare the simple giving away of intoxicating liquors unlawful, plain language would have been used to express such purpose, as is used in forbidding the giving to a minor. The section evidently requires the statute to be so construed as to forbid all gifts for a consideration, direct or indirect or remote, or made with the purpose of receiving anything in return. Thus, when liquor is given to those who buy other things, or to induce trade or attract custom, or in a hundred different ways which the ingenuity of law-breakers has or may devise to defeat the law, it is to be regarded as a violation of the statute.

Shannon v. Tama City.

But the statute does not forbid the simple act of giving, as in the case before us, where no consideration, reward or payment was given or promised, and none expected, and which was not intended as a subterfuge to conceal unlawful sales, and evade the penalties of the law. The courts have no authority by construction to usurp the powers of the legislature, and declare acts unlawful which are not so declared in the statutes. In our opinion the instructions given by the district court to the jury were erroneous.

REVERSED.

SHANNON V. THE TOWN OF TAMA CITY.

74	22
120	580
123	530

1. **Evidence : PRACTICE : POINT ALREADY ESTABLISHED.** Where the interest of a witness in the result of a suit has been fully shown, it is not reversible error to exclude further testimony on that point.
2. **Instructions : REPETITION NOT REQUIRED.** It is not error to refuse an instruction asked when the substance of it is given in the charge of the court.
3. **Cities and Towns : DEFECTIVE SIDEWALK : CONTROL OF WALK.** In an action for an injury caused by a defective walk in the defendant town, an instruction to the effect that plaintiff could not recover unless he had shown that defendant had built the walk, or had assumed control of it, was properly refused ; as the law presumes that it had actual control of the walk in the performance of the duties imposed by statute.

Appeal from Tama District Court.—HON. L. G. KINNE, Judge.

FILED, MARCH 8, 1888.

ACTION to recover for injuries resulting from a fall while walking upon a sidewalk of a street, caused by the negligence of defendant in permitting it to be in an unsafe and dangerous condition. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Shannon v. Tama City.

O. H. Mills and Struble & Stiger, for appellant.

No appearance for appellee.

BECK, J.—I. A witness for plaintiff, who had taken care of him while suffering from the injuries, testified that she had a claim against him for such services. Upon the cross-examination she was asked whether she knew any way of getting her pay except through this suit, and objection to the question made by plaintiff was sustained. Of this ruling defendant now complains, and insists that the evidence sought to be elicited would have disclosed the interest of the witness in the result of the suit, and for that reason it was competent and pertinent. It may be conceded that the evidence for this reason ought to have been admitted, but, as the witness in her testimony before given clearly admitted and showed her interest in the result of the suit, no prejudice resulted to defendant by the refusal of the court to permit further testimony on this point.

II. The defendant asked the court to instruct the jury that if the defect in the walk was not obvious and notorious, it was incumbent upon plaintiff to show that defendant had actual notice of the defect. An instruction given on the court's own motion (the sixth) presents substantially the same rule. It was not error to refuse its repetition.

III. The defendant requested an instruction to the effect that plaintiff cannot recover unless he has shown by the evidence that defendant built the sidewalk or had assumed control over it. The instruction was properly refused. The defendant had control of its streets and sidewalks. It could require sidewalks built by property owners or others to be properly constructed and to be kept in good repair. The law presumes that it had actual control over the sidewalks, as the law imposed upon it the duty to take and exercise control thereof.

1. EVIDENCE :
practice :
point already
established.

2. INSTRUCTIONS:
repetition not
required.

3. CITIES and
towns : defec-
tive sidewalk:
control of
walk.

Merrill v. Marshall County.

It was not, therefore, necessary to show that it had exercised actual control of the sidewalk, or that it had been built by defendant. An instruction to that effect was rightly given.

IV. Counsel for defendant complain of instructions given to the jury upon the questions as to the duty of plaintiff to exercise care and the obligation of defendant to maintain safe sidewalks. The objections made are hardly argued at all, being but little more than stated. We think the instructions are correct.

V. The verdict is not in conflict with the instructions, and is sufficiently supported by the evidence. The amount found for plaintiff is very moderate, and ought not to be the ground of complaint.

The judgment of the district court is

AFFIRMED.

MERRILL V. MARSHALL COUNTY.

THE IOWA CONSTRUCTION COMPANY V. THE SAME.

1. **Railroad Aid Taxes:** COMMISSION TO TREASURER FOR COLLECTING. There is no statute authorizing a county treasurer to withhold from the persons entitled to a railroad aid tax collected by him a commission of three per cent., or any commission, for the collection of the same. A commission for collection can be deducted only from the taxes collected by him for cities and towns.
2. ———: ACTION TO RECOVER FROM COUNTY: DEFENSE: SALE OF ROAD. In an action against a county to recover a portion of railroad aid taxes collected by the treasurer, which was retained by him and passed into the general county fund, the county cannot set up the fact that the companies for which the taxes were levied had sold and conveyed all their property and franchises before the taxes were due and collectible; although such defense might have been a good one for the taxpayers in resisting the payment of the tax. (Compare *Manning v. Mathews*, 66 Iowa, 675.)

74	24
81	192

74	24
137	289

Merrill v. Marshall County.

3. ——— : ——— : ——— : FORFEITURE BY DELAY IN COLLECTING. Nor can the county defeat a recovery in such case on the ground that the taxes have been forfeited by being permitted to remain in the treasury more than two years (Compare Laws of 1876, chap. 128, sec. 7), where it appears that the roads for which the taxes were voted were built, and the taxes, except the per cent. in controversy, were paid in installments to the persons entitled thereto, and that there was a continuing demand by them for the portion withheld.
4. ——— : ——— : JUDGMENT AGAINST COUNTY. In such case, where the tax in dispute had been placed in the general county fund, and had been expended in paying the county's ordinary indebtedness, a judgment therefor was properly rendered against the county. (*Barnes v. Marshall County*, 56 Iowa, 20, distinguished.)

Appeals from Marshall District Court.—HON. S. M. WEAVER, Judge.

FILED, MARCH 8, 1888.

THESE are actions at law, in which the plaintiffs claim to be the owners of certain railroad aid taxes which they allege the treasurer of the defendant unlawfully paid to the defendant. There were trials to the court, and judgments for the plaintiffs. Defendant appeals.

Binford & Snelling, for appellant.

Boardman & Boardman, for appellees.

ROTHROCK, J.—I. The two causes involve substantially the same questions, and will be determined in one opinion. The facts necessary to a proper decision of the cases, as we understand the rights of the parties, are not in dispute. It will, therefore, be unnecessary to set out the pleadings and a ruling made on a demurrer to one of the answers. It appears that certain townships in Marshall county voted taxes in aid of the construction of railroads. The taxes were properly levied. A certificate in due form was made to the effect that the railroad companies had earned the taxes

1. RAILROAD aid taxes: commission to treasurer for collecting.

Merrill v. Marshall County.

voted. The amounts were placed upon the tax books, and the tax was collected by the county treasurer, and the whole amount thereof, excepting three per cent., and some two hundred dollars in excess thereof, was paid over to the plaintiffs, who were assignees of the railroad companies. This three per cent. was retained by the treasurer, and with the two hundred dollars was paid into the county treasury as part of the ordinary county fund, upon the claim that it was a legal and proper commission for the collection of the tax.

The first question to be determined is, was there any lawful authority for retaining the sums in dispute as a commission for the collection of the tax? If such authority exists, it must be by reason of some statute, for it has always been held in this state that a public officer is not entitled to any official fees except such as are provided by law. Counsel for appellant cite us to several sections of the Code, and claim that authority for retaining the three per cent. is found therein. Reference is first made to chapter 123, of the Acts of the Sixteenth General Assembly. It is provided by section two of that act that railroad aid taxes shall be collected in the same manner and be subject to the same penalties for nonpayment as other taxes. We are further cited to subdivisions one and two of section 3793 of the Code, which provide that the treasurer shall receive for his compensation "three-fourths of one per cent. of all money collected by him as taxes due any incorporated city or town, *to be paid out of the same,*" and "three per cent. of all taxes collected by him for all other tax funds, *to be paid out of the county treasury.*" It is contended that the clause authorizing three per cent. as compensation for collection applies to all tax funds. We think it is probably correct that in making up the amount of the treasurer's annual salary as between the county and himself the three per cent. should apply to all tax funds, including the railroad aid tax. But there is no authority in any statute to which our attention has been called for reducing any fund by deducting the

Merrill v. Marshall County.

per cent. for collection from the fund, except in collections made of taxes for cities and towns. On the contrary, subdivision two of section 3793 of the Code expressly provides that the three per cent. for collection "shall be paid out of the county treasury." Considering the two subdivisions of the section together, it appears to us quite plain that the only fund from which the commission for collection can be deducted is the city and town taxes. Moreover, section four, of chapter 123, Acts 1876, requires that the tax, when collected, shall be paid to the treasurer of the railroad company, and, as no mention is made of any commission for the collection of the same, it must be understood that the whole and not merely a part of the tax shall be paid to the company.

II. It is claimed that the plaintiff has no right to recover, because the railroad companies sold and conveyed all of their property and franchises before the tax was due and collectible. 2. —: action to recover from county: defense: sale of road. This, no doubt, would be a good defense by the taxpayer in resisting the payment of the tax. *Manning v. Mathews*, 66 Iowa, 675. But we think the county is in no position to raise that question. The tax has been paid, and all of it but three per cent. has been paid to the railroad companies, and the taxpayers are presumably content therewith. Surely the county has no right to retain the tax upon a defense which can only be made by the taxpayer.

III. It is further claimed that under section 7, chapter 123, Acts 1876, the taxes have been forfeited, because they were allowed to remain in the county treasury more than two years. 3. —: —: —: forfeiture by delay in collecting. This provision of the statute was evidently enacted in order to secure the speedy and prompt building of the road. There is no question of that kind raised in these cases. The roads were built and the treasurer paid the taxes in installments to the parties entitled thereto as the money was received from the taxpayer. In both cases it fairly appears that there was a continuing demand for payment, and no consent is

Teabout v. Jaffray & Co.

shown that any part or per cent. of the tax should remain in the treasury. We do not regard this as a defense to the action.

IV. Lastly, it is claimed that no judgment can be rendered against the county for the claims in suit. This

4. —: —: judgment
against
county. would probably be correct if the money remained in the hands of the treasurer as a distinct fund. *Barnes v. Marshall County*,

56 Iowa, 20. But in the cases at bar the whole amount was placed in the general county fund, and expended in paying the ordinary indebtedness of the county. It has lost its identity as a railroad aid fund, and has been appropriated to the use of the county. The county should, therefore, be held liable for it. The question is quite different from that determined in *Barnes v. Marshall County*, *supra*, and other cases cited by counsel for appellant.

In our opinion the judgment of the district court should be AFFIRMED.

TEABOUT V. JAFFRAY & COMPANY *et al.*

74	28
120	69

Fraudulent Conveyance: SUBJECTION OF PROPERTY TO GRANTOR'S DEBT: RIGHT OF GRANTEE TO REDEEM FROM SALE: TIME. While the statutory right to redeem from an execution sale can be exercised only within the period and in the manner prescribed by the statute, the right of the grantee in a fraudulent conveyance to discharge a judgment against his grantor, which has been adjudged a lien upon the property, is an equitable one, and quite different. And where a husband conveyed a farm to his wife in fraud of creditors, and afterwards a judgment was recovered against him, and in an action against her it was decreed to be a lien on the farm, and before the sale she appealed from the judgment, but the appeal was not decided until more than a year after the sale, *held* that the sheriff was properly enjoined from executing a deed under the sale at the end of the year, and that upon the judgment creating the lien on the property being affirmed, and the payment by her, soon thereafter, to the clerk of the court in which the judgment was rendered, of the amount of the lien, though this was more than a year from the date of the sale, the property was discharged of the lien, and the injunction against the sheriff was properly made perpetual.

Teabout v. Jaffray & Co.

Appeal from Winnesheik District Court.—HON. C. T. GRANGER, Judge.

FILED, MARCH 8, 1888.

ACTION in equity to enjoin the execution of a sheriff's deed. The facts are stated in the opinion. The judgment was for plaintiff. Defendants appeal.

E. E. Cooley and *W. E. Akers*, for appellants.

L. Bullis and *C. Wellington*, for appellee.

REED, J.—On the sixth day of September, 1881, John Roper & Company recovered a judgment against Francis Teabout for about sixteen hundred dollars. At that time Emily Teabout, who was the wife of Francis Teabout, held the legal title to a farm in Winnesheik county, which was conveyed to her several years before by said Francis. Roper & Company instituted a suit in equity to subject the property to their judgment, alleging that the conveyance under which Emily Teabout held it was executed for the purpose of fraudulently covering the property from the creditors of the husband. Emily Teabout was served with the original notice in the action, but she neglected to appear or answer therein, and on the seventeenth of January, 1882, judgment was entered against her by default, in accordance with the prayer of the petition. On the fifth day of August, 1882, the property was sold on execution by the sheriff for the satisfaction of the judgment, and Roper & Company bid it in for the amount of their judgment and costs, and a certificate of purchase was issued to them by the sheriff. In October, 1882, Mrs. Teabout filed her petition, alleging that she was prevented by unavoidable casualty and misfortune from making her defense in the equity case of Roper & Company against her, and praying that the judgment rendered therein be set aside, and that she be permitted to make her defense. That application came on for

hearing at the January term, 1883, of the circuit court, the original judgment having been rendered in that court, and on the hearing she was denied relief. From that she appealed to this court, but at the December term, 1883, the judgment was affirmed. See 62 Iowa, 603. While the appeal was pending she instituted this suit, alleging in her petition that unless the sheriff, who was made a party, was enjoined from so doing, he would, on the expiration of the year allowed by the statute within which the property might be redeemed from the sale, execute a deed to the purchaser; and a temporary injunction was allowed by the judge. Soon after the order of affirmation was entered in this court, she paid to the clerk of the circuit court the amount which he represented was necessary to effect the redemption of the property from the sale, and he issued to her a certificate. It transpired afterwards, however, that the clerk had made a mistake in his computation, and that the amount paid was not sufficient; but when this discovery was made she paid an additional sum, which, with that formerly paid, was sufficient to satisfy the money judgment against her husband. Pending the action, Mrs. Teabout executed a conveyance of the property to Angie Vallean, and she was substituted as plaintiff. Roper & Company also assigned the certificate of purchase to E. S. Jaffray & Company, and they intervened in the action. The judgment of the district court perpetuates the injunction.

It will be observed that the payment of the money was made after the expiration of one year from the date of the sale. Plaintiff has proceeded upon the theory that the right remaining to her after the sale of the premises was the statutory right of redemption, and that, owing to the peculiar circumstances of the case, she is in equity entitled to an extension of the time within which to exercise the right. While we are able to reach the result which plaintiff seeks to attain, we do not adopt that theory as to the nature of her right. The rule undoubtedly is that a statutory right of redemption can be exercised only within the period and

Teabout v. Jaffray & Co.

in the manner prescribed by the statute creating it. It is true that this court has in two cases permitted the right to be exercised after the expiration of the period ; but, as is apparent from the opinions, that result was reached after much hesitancy, and the holding is based upon the special facts of the cases. *Hughes v. Feeter*, 23 Iowa, 547 ; *Wickersham v. Reeves*, 1 Iowa, 413. These cases cannot be regarded as establishing a rule upon the subject, but are exceptional. The provisions of the statute with reference to the redemption of real estate from execution sale have relation to cases in which the property of the defendant has been sold in satisfaction of a judgment against him. Perhaps they would apply to the case of a purchaser who had taken the property subject to the lien of a judgment ; but we need not inquire as to that in the present case. The judgment for the satisfaction of which the property in question was sold was against plaintiff's grantor, and he alone was liable for the debt. Neither was it a lien on the property when she acquired the title, for it was not rendered until long after that. The property, however, was subjected to the satisfaction of the judgment by the decree in the equity action. The effect of that decree was to create a lien upon the property for the security of the money judgment. *Howland v. Knox*, 59 Iowa, 46. The conveyance to plaintiff, although fraudulent as to creditors, was valid as between her and her husband. *Wright v. Howell*, 35 Iowa, 288 ; *Mellen v. Ames*, 39 Iowa, 283. Plaintiff, then, was the owner of the property, but she held it subject to the lien created by the decree ; and she had the right, for the purpose of protecting her interest, to discharge the lien. But that right is quite distinct from the right of redemption created by Code, section 3102. It is a purely equitable right, and it continues until her interest in the property is divested by a sale and deed. But when the sale was made she was contesting in good faith, and in the manner prescribed by law, the right of the judgment creditor to subject her property to the satisfaction of his judgment. He had his decree establishing his lien,

Coenen & Mentzer v. Staub.

it is true, but she was seeking by a proper and timely proceeding to set it aside; and, until that proceeding should be terminated, it could not be determined that she would ever have occasion to exercise the equitable right to discharge the lien, for it could not be sooner known that the decree establishing it would be maintained. The question whether it would be necessary for her to exercise the right depended upon whether she would succeed in her application to set the decree aside, and she could not be required to exercise it until that was determined; and a court of equity will ordinarily interfere by injunction to preserve or continue a right until the termination of the litigation upon the result of which the right depends. The money was properly paid to the clerk of the court in which the judgment was rendered. Money paid in satisfaction of a judgment may always be paid to that officer. The failure to pay the full amount in the first instance was the result of an honest mistake, and, as plaintiff made good the deficiency as soon as the mistake was discovered, her rights will not be defeated thereby. We are of the opinion that the result reached by the district court is right, and the judgment will be

AFFIRMED.

COENEN & MENTZER V. STAUB *et al.*

Mechanic's Lien : FOR LUMBER FOR SIDEWALK ON STREET. One who, under contract with the owner of a town lot, furnishes lumber for the construction of a sidewalk on the street along and adjacent to the lot, cannot have a mechanic's lien upon the lot for the price of the lumber, the improvement not being upon the lot.

Appeal from Shelby District Court.—HON A. B.
THORNELL, Judge.

FILED, MARCH 8, 1888.

ACTION on account for building materials and for the foreclosure of a mechanic's lien. The materials were furnished under a contract between plaintiffs and defendant Mary Staub, and were used in the construction of a sidewalk on the street in front of a lot owned by her in the town of Harlan. Defendant Lewis Ginery is a subsequent purchaser of the lot. The district court gave plaintiffs judgment against defendant Mary Staub for the amount due on the account, but refused to establish the lien prayed for. Plaintiffs appeal.

Beard & Myerly, for appellants.

Fremont Benjamin, for appellees.

REED, J.—Plaintiffs seek to enforce a lien for the materials against the lot in front of which the sidewalk was constructed, and the only question in the case is whether they are entitled to that remedy. The statute under which the remedy is claimed (Code, sec. 2130) is as follows: "Every mechanic or other person who shall do any labor upon, or furnish any material, machinery, or fixtures for, any building, erection, or other improvement upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this chapter shall have, for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner *on which the same is situated*, to secure the payment of such labor done, or materials, machinery or fixtures furnished." Under this provision, the lien attaches to the building, erection or improvement, and to the land *upon which it is situated*. The sidewalk is not situated upon the lot sought to be charged, but in the street on which it fronts. It is not an improvement upon or of the lot, nor was it made for the benefit of

Stanley v. Barringer.

the owner, but of the public, and was constructed by the owner, as we presume, in obedience to some requirement of the town government. Under provisions of the statute, many street improvements in incorporated towns and cities may be made at the cost of the owners of the abutting property. Streets may be reduced, or filled to grade and paved, and sewers and sidewalks may be constructed therein, and, when the work is done by the city, the cost may be taxed by special assessment upon the abutting property, or the property-owners may be required to do the work in front of their respective properties. But, however it may be done, the work is a public, rather than private, improvement; and the law does not afford the mechanic or materialman who does such work or furnishes material therefor, under contract with the owner of the abutting property, a lien therefor upon the property.

AFFIRMED.

STANLEY V. BARRINGER.

1. **Master and Servant: WORK DONE ON FARM: EVIDENCE.** In an action for services upon a farm during a series of years, where others were also employed during the time, evidence tending to show that the defendant had a large farm and a large number of cattle and horses was immaterial.
2. ——— : ——— : **SUFFICIENCY OF PAYMENT: SERVANT'S SATISFACTION.** In such case, where the servant testified in part as to what he had received for his services, and stated that he, at the time, thought that he was well enough paid, and that he would have been satisfied had it not been for the influence of other parties, *held* that, in the absence of any showing of fraud or undue influence, he was not entitled to recover.
3. **Appeal: PRACTICE: AMENDING ASSIGNMENT OF ERRORS: TIME: COSTS.** Although an original assignment of errors may not be filed in this court later than ten days before the first day of the trial term (Code, sec. 8183), yet an amendment to such assignment may be filed, under section 2689 of the Code, upon motion for leave to do so, at any time before the submission of the cause; but, in this case, the costs incurred up to the time of filing the amendment are taxed to the appellant.

74	34
84	313
74	34
86	600
74	34
90	127
74	34
106	482
74	34
111	413

Stanley v. Barringer.

Appeal from Palo Alto District Court.—HON. GEO.
H. CARR, Judge.

FILED, MARCH 8, 1888.

ACTION to recover for work and labor performed by the plaintiff for the defendant. Trial by jury. Verdict and judgment for plaintiff. Defendant appeals.

Harrison & Jenswold, for appellant.

Hughes & Chamberlain and *P. O. Cassidy*, for appellee.

SEEVERS, C. J.—The plaintiff seeks to recover for work and labor performed for the defendant under an express and implied contract. The jury found for the defendant as to the express contract. So far as material to the plaintiff's recovery on the implied contract, the facts are that the plaintiff worked and labored for the defendant for several years as a farm-hand, and he claims he is entitled to recover what his services are reasonably worth. He commenced working for the defendant in 1880, when he was eighteen years of age, and so continued in such employment until 1886. During this time, his home was at the defendant's, and he received "good and sufficient clothing, medicine and doctor's attendance when required, and sufficient spending money for his wants." The evidence fails to show what the services performed were worth, but there is evidence tending to show what the plaintiff did, and the value of, or price paid for, farm-hands during at least a portion of the time plaintiff worked for defendant.

I. The plaintiff was permitted, against the defendant's objection, to introduce evidence tending to show that the defendant had a large farm and a large number of cattle, cows and horses. It is said that the evidence was admissible on the theory that it tended to show the amount of work

1. MASTER and servant : work done on farm : evidence.

Stanley v. Barringer.

done by the plaintiff. It is not claimed that the plaintiff did all the work on the farm, but it is said the evidence tended to show he did as much as others in the plaintiff's employ, and, therefore, the evidence was admissible. But we do not concur in this proposition. The plaintiff sought to recover what his services were worth. No special circumstances were pleaded or relied on. Therefore, it was immaterial how many cattle and horses or how large a farm, the defendant had; but the only questions were: Did the plaintiff perform work for the defendant, and what were his services worth? We think the court erred in admitting the evidence.

II. The plaintiff testified: "I cannot swear to a certainty. He agreed to give me the same wages he was paying his other hands. That is a God's fact. * * * I had with them a good home, good and sufficient clothing, medicine and doctor's attendance when I needed it, and sufficient spending money for my wants. I have been dressed as well as any farmers' boys in this part of the country. I left him. * * * When I bid him good-by, he gave me a pair of boots and some spending money. Had it not been for other parties telling me to the contrary, I would have been satisfied with what I had got, but they told me to see Hughes, of Spencer, and sue him. My judgment was that he had paid me all I ever had been worth to him." Under this evidence, we are clearly of the opinion that plaintiff was not entitled to recover, and the verdict should have been for the defendant. The other evidence is not so strong and persuasive as to overcome that of the plaintiff. No fraud or undue influence is shown, nor does it appear how much the plaintiff received, but he, under oath, states that in his judgment he was paid all his services were worth. Counsel for the plaintiff in argument assert that the record does not contain all the evidence, but no such statement is contained in the amended abstract. The abstract purports to contain all the evidence. The motion for a new trial should have been sustained on

2. — : — :
sufficiency of
payment : ser-
vant's satis-
faction.

Stanley v. Barringer.

the ground that the verdict was not sustained by the evidence; unless, as the plaintiff contends, we cannot consider the error assigned, that the verdict is against the evidence. This question we proceed to consider.

III. This case was submitted at the October term, and such was the trial term. On the fifteenth day of

3. APPEAL :
practice :
amending
assignment
of errors :
time : costs.

September the abstract and assignment of errors was served on counsel for appellee, and filed in this court. Appellee's amended abstract was served on the eleventh, and filed in this court on the thirteenth, of October. On October 11, an additional assignment of errors was placed in the post-office at Emmetsburg, directed to one of the counsel for the defendant at the same place. It was inclosed in an envelope, and postage thereon paid. Ordinarily we would assume that it was received the next day, but counsel for appellee in argument state that it was not in fact received until the fourteenth day of October, on which day such assignment was filed in this court, and the cause submitted on the twenty-fifth day of said month, together with a motion to strike out the additional assignment of errors, on the ground that the same is not authorized by the rules of this court, or any statute; and this is the question we are called to determine. The rule relied on is number fifty-one, but that provides that the court in its "discretion may waive the failure to file an assignment of errors at the time therein provided." The rule does not refer to additional or amended, but to the original, assignment of errors. The serious difficulty is that the statute provides that the assignment of errors must be served ten days before the first day of the trial term, and if this is not done the appellee may have the appeal dismissed or the judgment affirmed, unless good cause be shown for the failure by affidavit. Code, sec. 3183. Of course, this statute cannot be abrogated by a rule of this court. See *Ind. District of Croker v. Ind. District of Ankeny*, 48 Iowa, 206. The right of appellant to file an amended assignment of errors was recognized in *Brown v. Rose*, 55 Iowa, 734, and *Kendig v. Overhulser*, 58 Iowa, 195;

Stanley v. Barringer.

but in these cases the amendments were filed ten days before the trial term. At least it was so held in the case first cited. It has also been held that such assignment filed with the reply to appellee's argument is too late. *Betts v. City of Glenwood*, 52 Iowa, 124; *Russell v. Johnston*, 67 Iowa, 279. But the distinction between these cases and the one at bar is that the amended assignment in the former was not served on the appellee. In the latter it was served ten days before the case was set for hearing. It is evident that section 3183 of the Code has reference to the original assignment of errors, and not to any amended or additional assignment that may be filed. Now the question is whether, in the furtherance of justice, this may be done. This question must be answered in the affirmative, for the reason that the statute so provides, as we construe it. Code, sec. 2689. This statute is of a general character, and applies to all courts, and is peculiarly applicable to a court of last resort, for the reason that ordinarily, if a mistake cannot be corrected before the case is submitted, it never can be. It has been the practice to permit amended assignments of error to be filed on motion for leave to do so, and we have thought it best to formally sustain such practice in this case, so that the profession may be properly advised. Counsel for the appellee insist, in the event the amended assignment of errors is permitted to stand as a part of the record, that appellant should pay all costs incurred up to the time it was filed. This position we think should be sustained, and the costs will be taxed accordingly.

REVERSED.

Harl v. The Pottawattamie Co. Mut. Fire Ins. Co.

HARL, ADM'R, V. THE POTTAWATTAMIE COUNTY MUTUAL
FIRE INSURANCE COMPANY.

74	39
94	437
74	39
110	229
74	39
119	174

1. **Fire Insurance : MUTUAL COMPANY : CORPORATE CAPACITY : DEATH OF MEMBER : SUBSEQUENT LOSS : ASSESSMENT OF ADMINISTRATOR : ESTOPPEL.** Plaintiff's intestate was a member of the defendant company, and held its policy of insurance upon certain property. After his death, but within the term covered by the policy, the property was destroyed by fire. The company afterwards assessed the administrator on account of the policy, and received from him as such the amount of the assessment. *Held* that the company was estopped from claiming that the policy died with the decedent ; and that it was immaterial whether the company was a corporation or a mere voluntary association.
2. ——— : ——— : **ACTION ON POLICY NOT CONDITIONED UPON ASSESSMENT.** Where neither the policy of a mutual fire insurance company, nor the articles and by-laws therein referred to, contained any limitation of liability to the amount realized from an assessment, *held* that an action for the full amount of the loss, not exceeding the insurance, could be maintained against the company before any assessment was made to meet the loss. (*Bailey v. Mut. Ben. Ass'n*, 71 Iowa, 689, *distinguished*.)
3. ——— : ——— : **ACTION ON POLICY : AMENDMENT : MANDAMUS TO COMPEL ASSESSMENT.** In an action against a mutual insurance company, which had no funds to pay losses except as it obtained them by special assessments, it was proper to ask, as auxiliary to the main action, that a writ of *mandamus* issue to compel the levy of an assessment to pay the loss ; and when such relief was asked in an amendment to the petition, it was error to strike it from the files on the ground that it was not a proper amendment, but the introduction of a new cause of action.
4. **Evidence : PRACTICE : ERROR WITHOUT PREJUDICE.** It is not prejudicial error to exclude evidence which is afterwards admitted.
5. **Appeal : PRACTICE : FILING AMENDMENT TO ABSTRACT : LEAVE : TIME.** Where the matter contained in an amendment to appellant's abstract was sufficiently identified as a part of the record, leave of the court to file it was not necessary, nor did the mere fact that it was filed after the cause had been argued by appellee entitle the latter to have it stricken from the files. (Compare *Frost v. Parker*, 65 Iowa, 178, and *Palo Alto County v. Harrison*, 68 Iowa, 81.)

Harl v. The Pottawattamie Co. Mut. Fire Ins. Co.

Appeal from Pottawattamie Circuit Court.—HON.
J. P. CONNER, Judge.

FILED, MARCH 8, 1888.

THIS is an action on a contract issued by defendant to T. Harl, now deceased, brought to recover nineteen hundred and ninety-five dollars as the alleged value of the property insured, and destroyed by fire after the death of T. Harl.

Smith & Harl, D. B. Dailey and W. I. Smith, for appellant.

Wright, Baldwin & Haldane, for appellee.

ROBINSON, J.—The plaintiff seeks to recover as the administrator of the estate of decedent. The facts seem to be that the defendant was organized to insure both real and personal property against loss or damage by fire and lightning. In its organization the rights, liabilities and privileges provided by law for mutual fire insurance companies were in terms assumed. The property in controversy was insured by defendant, the risk thereon to commence on the twenty-second day of January, 1884, and continue five years. The owner of the property died in January, 1885. The property insured was destroyed by fire in April, 1885, at which time plaintiff was administrator of the estate of decedent. Proof of loss was made to defendant and received by it without objection. The loss was adjusted and agreed upon by the proper officers of defendant the next day after the fire, and fixed at the full amount named in the policy on the property in controversy. The loss on a house and barn insured by the same policy was adjusted at the same time at six hundred and twenty-five dollars. An assessment was made on the members of the company, and the amount paid, but no assessment has been made to pay the loss in controversy. After the commencement of this action, the plaintiff

Harl v. The Pottawattamie Co. Mut. Fire Ins. Co.

paid an assessment made upon him as administrator of the estate of decedent on account of the contract of insurance in suit.

The petition alleges that defendant is a corporation organized as a mutual insurance company. The answer denies this, and alleges that defendant is a "voluntary association of persons binding themselves together to reimburse one another in case of loss by fire, in manner and according to the method prescribed by their articles of association and by-laws." The answer also states that the organization was effected in accordance with the provisions of section 1160 of the Code; that decedent became a member of the association, but that his connection with it was a personal one, which did not pass to his administrator, but was terminated by his death. In reply, the plaintiff avers that defendant is estopped from denying its corporate character, for the reason that it issued the policy of insurance as a corporation, and has acted as and in the name of a corporation; also, that it is estopped from denying its obligations under the policy, for the reason that, after the death of decedent, it assessed the plaintiff as administrator and as a member and policy-holder, and received the amount assessed from plaintiff as administrator. On the trial, and after plaintiff had offered his evidence and rested, the court sustained a motion of defendant to instruct the jury to return a verdict in its favor. We are required to determine the correctness of this ruling.

The motion seems to have been made upon the theory that defendant was not a corporation, but a mere voluntary association of persons; that the contract of insurance was a personal one, which did not survive the decedent; that defendant is not liable for any sum until an assessment on its members has been made, and then only for the amount realized from such assessment; that there is no evidence that plaintiff had any insurable interest in the property at the time of its destruction; and hence that this action cannot be maintained.

I. In the view we take of this case, it is immaterial for the purposes of this decision whether the

Harl v. The Pottawattamie Co. Mut. Fire Ins. Co.

1. FIRE insur-
ance: mutual
company: cor-
porate capa-
city: death of
member: sub-
sequent loss:
assessment of
administrator:
estoppel.

defendant is a corporation or a mere voluntary association of persons, as it claims. In either case it had the power to enter into the contract in suit, and can sue and be sued in the name in which it made the contract. Having the power to make the contract entered into with decedent, it had the power to ratify and confirm it in the hands of plaintiff as the legal representative of decedent, and to admit the plaintiff to the duties and privileges of membership. This it did when it assessed him in his representative character as a member, and received from him in that character the amount of the assessment. We think, under the facts of this case as disclosed to us, that defendant is estopped from denying its liability for the loss in question. It is insisted by appellee that the act of defendant in assessing the plaintiff and receiving payment from him did not have the effect to continue the original policy in force, but was in effect a new contract of insurance. But we do not think this position is sustained by the record. We are satisfied from it that no new contract was contemplated by either party, and that the assessment and payment were on account of the contract with decedent. Having treated this as in force, and enjoyed its benefits, defendant ought not to be permitted to deny the liability which it creates.

II. It is claimed by appellee that no action can be maintained for the loss in question until after an

2. — . — :
action on
policy not
conditioned
upon assess-
ment.

assessment has been made upon the members of defendant to pay it, and that its liability would then be measured by the amount realized from such assessment, not exceeding the loss. In support of this position it relies upon the case of *Bailey v. Mutual Benefit Ass'n*, 71 Iowa, 689. But in that case the contract of insurance called for the net proceeds of an assessment, not to exceed three thousand dollars. The articles of incorporation expressly limited the amount of liability to the net amount collected on the advance assessment made previous to the death of the member. In this case there is no such

Harl v. The Pottawattamie Co. Mut. Fire Ins. Co.

restriction in the contract of insurance, nor in the articles and by-laws to which the contract of insurance refers. It provides for the insurance of the property included therein in specific amounts. A clause is inserted providing that there shall be no liability except on terms prescribed in the articles of association and by-laws. The articles and by-laws referred to contain no limitation of liability to the amount realized from an assessment. On the contrary, they require payment of the amount due for a loss sustained to be made as soon as practicable, and in all cases within sixty days from the receipt of proof of loss. We, therefore, conclude that it is not necessary that an assessment be made and collected before this action can be maintained, and that the amount of recovery is not limited excepting by the amount of insurance and the loss sustained.

III. The plaintiff filed an amendment to his petition, in which he alleged, in substance, that the loss in
 8. —: —: controversy was adjusted by the proper
 action on officers of defendant at the sum of nine-
 policy: teen hundred and twenty dollars on the first
 amendment: day of April, 1885; that more than sixty
 mandamus to compel days had elapsed after such adjustment before the com-
 assessment. mencement of this action; and that defendant had neg-
 lected and refused to make any assessment to pay the
 loss, and asking for an order of *mandamus* to compel
 the levy of such an assessment. The court sustained a
 motion to strike this amendment from the files, "because
 the same is not in fact an amendment thereto, but the
 substitution of a new and independent cause of action,
 inconsistent with the averments of the plaintiff's origi-
 nal petition, which cannot be joined therewith, and
 requiring the addition of other parties defendant." We
 think the amendment was a proper one, and that it was
 error to strike it from the files. The relief asked by
 the amendment was auxiliary to that demanded in the
 original petition. The articles of association of defend-
 ant require that an assessment be made when necessary
 to pay losses adjusted. It is not claimed that defendant
 has funds in hands with which to pay this loss;

Harl v. The Pottawattamie Co. Mut. Fire Ins. Co.

hence an assessment is necessary, and it is the duty of defendant to have it made. We think the relief sought by the amendment is authorized by sections 3375 and 3381 of the Code.

IV. Appellant complains of the sustaining of objections to questions asked the witness Clark. If it be true that the ruling complained of was erroneous, no prejudice resulted, for the reason that the witness was afterwards permitted to testify as to the matters to which the questions referred to were directed.

4. EVIDENCE:
practice:
error without
prejudice.

V. The appellee seeks by motion to have stricken from the record an amendment to the abstract filed by appellant, on the grounds that such amendment does not purport to state that the matter therein alleged appears of record, but is a statement of fact not based upon any evidence contained in the record, and on the further ground that the amendment was filed after the cause had been fully argued by appellee, without leave of the court. We think the motion should be overruled. (1) The material part of the amendment is in the nature of an additional statement as to the contents of two papers introduced in evidence on the trial of the cause and referred to in the abstract. That the papers are a part of the record, and as such properly referred to in the abstract, is not questioned. We, therefore, conclude that the matter contained in the amendment is sufficiently identified as a part of the record. (2) Leave to file the amendment was not necessary, nor does the fact that it was filed after the cause had been argued by appellee entitle the latter to the relief it demands. *Frost v. Parker*, 65 Iowa, 178; *Palo Alto County v. Harrison*, 68 Iowa, 84.

5. APPEAL:
practice: fil-
ing amend-
ment to
abstract:
leave: time.

For the errors indicated this case is

REVERSED.

Morris v. Burley.

MORRIS V. BURLEY.

1. **Replevin: PLEADING: SPECIAL INTEREST: MONEY JUDGMENT.** Action to recover certain property, or a judgment for its value. Plaintiff alleged that he, as agent of another, had a special property in certain described books of the aggregate value of two hundred and fifty-nine dollars. *Held* that this was a sufficient statement of the value of his special property to entitle him to a money judgment in case the books could not be found, because his interest was equal to the value of the books.
2. **Verdict: EVIDENCE TO SUSTAIN ON APPEAL.** A verdict which finds some support in the evidence will not be set aside on appeal on the ground that it is not sustained by sufficient evidence.
3. **Replevin: SPECIAL PROPERTY: FORM OF VERDICT.** The court instructed the jury, if they found for plaintiff, to state in the verdict that he was entitled to the possession of the goods as agent, and the value of his interest therein. The verdict was for plaintiff, without saying "as agent." *Held* that there was no prejudicial error in rendering judgment upon the verdict in favor of plaintiff for the value of his interest as found.

Appeal from Benton District Court.—HON. L. G. KINNE, Judge.

FILED, MARCH 8, 1888.

ACTION to recover specific personal property. The petition states "that plaintiff has a special property in certain books (described in the petition) of the aggregate value of two hundred and fifty-nine dollars; that he is entitled to the immediate possession of the same; that he was in the possession thereof, as agent of P. F. Collier; that defendant wrongfully detains possession of the same; * * * that the alleged cause of detention * * * is that the defendant claims to have a hotel-keeper's lien on them for the board of H. R. Richardson and one Stearns." Wherefore judgment was asked that said property be delivered to the plaintiff, or for the value thereof if the same could not be.

Morris v. Burley.

found. The answer denies some of the allegations of the petition, but admits that defendant took possession of the goods on the ground stated in the petition. Trial by jury; verdict and judgment for the plaintiff for the value of the goods. The defendant appeals.

Chas. A. Clark and J. J. Mosnat, for appellant.

Scrimgeour & Sweet, for appellee.

SEEVERS, C. J.—I. Counsel for the appellant insist that the petition simply states that the plaintiff

1. REPLEVIN: has a special property in the goods, and
 pleading: spe-
 cial interest: does not allege the value of such right, and,
 , money judg-
 ment. therefore, he is not entitled to a judgment for
 the value of the property, although he has been deprived
 of the possession thereof. We do not think this is a
 fair construction of the petition. It is therein stated,
 in substance, that the plaintiff was in possession of the
 goods as agent of one Collier, and that the value of such
 goods is two hundred and fifty-nine dollars, and that
 the defendant has deprived the plaintiff of the posses-
 sion of the goods. If the plaintiff had a special property
 in the goods of the value stated, it seems to us his
 interest or right is as great as such value, and if posses-
 sion of the goods is taken by another, he is entitled to
 have them returned to his possession. This must be so,
 and it logically follows that, if he cannot obtain the
 goods, he is clearly entitled to a judgment for the value
 thereof. There was evidence tending to sustain the alle-
 gations of the petition.

II. It is contended that, under the statute, an innkeeper has a lien upon all property under the control

2. VERDICT: evi- of his guests, and the court so instructed the
 dence to sus-
 tain on appeal jury. By the verdict the jury must have
 found that neither Richardson nor Stearns had such
 possession or control, and we cannot interfere with such
 finding, for the reason that there is evidence on which
 the verdict can be properly and fairly based. Nor can
 we, under the evidence, say the verdict is excessive.

III. The court, in substance, instructed the jury,

Clyde v. Peavy.

if the finding was for the plaintiff, to state in the verdict that he was "entitled to the possession of the goods as agent," and the value of his interest therein. The verdict is in favor of the plaintiff without saying "as agent," and the judgment follows the verdict. The petition and the entire record show that the plaintiff was not the absolute owner of the goods; but, as defendant wrongfully deprived him of the possession thereof, we are unable to see why the defendant can insist that he is in any respect prejudiced if the goods are returned to the plaintiff as principal or agent, and this, it seems to us, is true as to the money judgment. It is said the owner of the goods may bring an action against defendant for the value thereof. Conceding this, we are unable to see that the defendant would, in such case, have been protected if the jury had found the plaintiff was entitled to the possession as agent, and the judgment had followed the verdict. We do not think there is any prejudicial error in the record, and, therefore, the judgment of the district court is

AFFIRMED.

CLYDE V. PEAVY.

1. **Husband and Wife: ACTION FOR DIVORCE: HUSBAND'S LIABILITY FOR WIFE'S ATTORNEY FEES.** It is the settled doctrine in this state that in actions for divorce the husband is liable to the wife's attorney for his reasonable fees earned in conducting the litigation in her behalf (*Porter v. Briggs*, 38 Iowa, 166; *Preston v. Johnson*, 65 Iowa, 285); and the rule applies not only to the wife's chief counsel, but also to assistant counsel properly employed by him under her directions.
2. ——— : ——— : **INTERLOCUTORY ALLOWANCES FOR WIFE'S ATTORNEY FEES: HUSBAND'S FURTHER LIABILITY.** Orders made pending an action for divorce, making allowances to the wife for attorney fees, are not final adjudications of the amount to which her attorneys are entitled for their services, and the fact that the husband has paid all such allowances is not a good defense to an action by one of her attorneys against him for the reasonable value of services not covered by such allowances.

Appeal from Mitchell District Court.—HON. G. W. BURDICK, Judge.

74	47
78	471
78	479
78	605

74	47
d140	381

Clyde v. Peavy.

FILED, MARCH 8, 1888.

THE plaintiff, who is an attorney-at-law, seeks by this action to recover for legal services rendered in an action for divorce brought by the defendant against his wife, and in which action the legal services in question were rendered in behalf of the wife. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.

J. M. Moody and M. M. Browne, for appellant.

W. L. Eaton and J. F. Clyde, for appellee.

ROTHROCK, J.—I. The action for divorce in which the legal services in question were rendered was commenced at the October term, 1885, of the district court of Mitchell county. The petition for divorce charged the wife of the defendant with the crime of adultery, and with such cruel and inhuman treatment as to endanger his life. The defendant's wife filed a cross-petition, in which she claimed a divorce upon the ground of cruel and inhuman treatment. The cause was continued, and the venue thereof was changed to the circuit court, where a full trial was had, and on the fourth day of September, 1886, a final decree was rendered, by which both the petition for divorce and the cross-bill were dismissed as not being sustained by the proof. The evidence shows that, when the action for a divorce was commenced, the defendant therein employed W. L. Eaton as counsel, and that in connection with such employment she authorized said Eaton to employ assistant counsel, if in the progress of the case he should be of the opinion that assistance was necessary. In pursuance of this authority, Eaton associated the plaintiff herein with him, and they together conducted the litigation in behalf of the wife. The principle has been established in this state that in actions for divorce the husband is liable to the wife's attorney for reasonable fees earned in conducting the litigation in behalf of the wife. This cannot be regarded as an open question.

1. HUSBAND and wife : action for divorce : husband's liability for wife's attorney fees.

Clyde v. Peavy.

Porter v. Briggs, 38 Iowa, 166; *Preston v. Johnson*, 65 Iowa, 285. The defendant concedes this general proposition; but in his answer denies that the plaintiff was in the employ of the defendant's wife, and that if he performed any legal services they were wholly unnecessary; that his assistance was not required, and that, therefore, the defendant is not liable therefor. This was a good defense to the action. But the evidence upon the trial shows without conflict that the services rendered by the plaintiff were necessary, and the objection made that the plaintiff was not employed by a contract made by the wife in her own person appears to us to be without merit. It was clearly within her power to employ her leading counsel, and authorize him to determine whether assistance was necessary; and, if he should be of opinion that it was, to select some one to act as co-counsel with him. And the proof shows that she consulted and advised with the plaintiff and Eaton during the litigation, and there is no evidence that Eaton acted in bad faith in employing assistance.

II. But the defendant set up other defenses in his answer, which present the main questions in the case, and which we will now proceed to consider.

2. —: —;
interlocutory
allowances
for wife's at-
torney fees:
husband's
further liabil-
ity.

It appears from the answer, and certain interlocutory orders exhibited with it, that at the term at which the action for divorce was commenced, the defendant's wife, by W. L. Eaton, her attorney, made an application to the court for a sufficient sum of money to enable her to defend said action, employ counsel, procure the attendance of witnesses, etc. This motion was sustained, and the following order was made: "Defendant is allowed fifty dollars for her support pending the suit, and the further sum of one hundred dollars attorney's fees, and to prepare and present her defense." The amounts named in the order were paid by the defendant. At the January term, 1886, of the court, another application was made for her support until the final decision of the case. Upon this application an order was made, which

Clyde v. Peavy.

is as follows: "It is ordered that the plaintiff pay the entire expense of taking, transcribing and producing the evidence in this case. Not, however, the expense of defendant's attorneys, unless further ordered, except as heretofore ordered." The defendant claims in his answer that this application, and a subsequent one which was made, was for attorney's fees as well as for alimony proper. But the record, which is exhibited with the answer, shows that no application was made for attorney's fees after the one in which the one hundred dollars was allowed. It is claimed in the answer that these allowances or orders made by the court are a full and final adjudication of the question of attorney's fees, and that the plaintiff is thereby estopped from further litigation upon that subject. The court below was of a different opinion, and a demurrer to the answer was sustained, and we are asked to reverse the judgment because it is claimed that the court erred in holding that the answer did not show that the claim was adjudicated. Orders made for temporary alimony for the support of the wife and for attorney's fees, or suit money, as it is sometimes called, are not like ordinary money judgments. They cannot, in the very nature of things, be regarded as final adjudications as to the rights of the parties. These orders are usually made to continue from term to term, for the reason that it is impossible to determine at the beginning what the necessities of the litigation may require. It may continue for years, and the court cannot determine in advance that any named sum of money ought to be a full allowance for all purposes. This being the nature of the proceeding, no mere temporary order can be said to be a final adjudication. Additional allowances may be made from time to time. We are clearly of the opinion that the court correctly sustained the demurrer to the answer. We discover no other alleged error which we think it necessary to discuss, and we are united in the opinion that the judgment ought to be

AFFIRMED.

Roose & Wainwright v. Billingsly & Nanson.

ROOSE & WAINWRIGHT V. THE BILLINGSLY & NANSON
COMMISSION COMPANY.

74	51
91	381
74	51
92	737

1. **Mechanic's Lien : DESCRIPTION OF PROPERTY.** Where in the statement filed with the clerk of the court as the foundation for a mechanic's lien the description of the property to be charged was as follows: "Thirty lengths of corn-cribbing at Mills Station, Pottawattamie county, Iowa." *held* that it was too indefinite for the purpose. (See Laws of 1876, chap. 100, sec. 6.)
2. ——— : **LUMBER FOR NUMEROUS BUILDINGS : APPLICATION OF MATERIAL : SUBSEQUENT PURCHASER.** Where lumber was furnished for the erection of numerous corn-cribs at several different places, and the cribs were afterwards sold to another party, *held* that, if any of them were complete when purchased, and it was not shown that any of the lumber furnished within ninety days of the purchase went into such completed cribs, then the purchaser took them free from any lien for the lumber,—no statement for a lien having been filed until after the purchase.

Appeal from Mills District Court.—HON. A. B.
THORNELL, Judge.

FILED, MARCH 8, 1888.

ACTION for the enforcement of a mechanic's lien. The defendants, McGregor Bros., were primarily liable for the price of the materials, and the district court entered judgment against them for the amount due on the account. The other defendant is a subsequent purchaser of the property sought to be charged with the lien. The district court refused to enforce the lien, and plaintiffs appeal.

W. S. Lewis, for appellants.

C. S. Keenan, for appellees.

REED, J.—The following is the description of the property contained in the statement filed with the clerk for the purpose of preserving the lien: “Thirty lengths of corn-cribbing at Mills Station, Pottawattamie county, Iowa; five lengths of corn-cribbing at Mineola, Iowa; fourteen lengths of corn-cribbing at Silver City, Iowa; elevator office and fifteen lengths of corn-cribbing at Malvern, Iowa; office and twenty-seven lengths of cribbing at Lawrence, except the part owned by J. B. Mears; ten lengths of cribbing at Solomon, Iowa. All at said stations along the Wabash railway.” Plaintiffs proved that they furnished the materials under a contract with McGregor Bros., but did not prove that the latter had any interest in or right to the real estate upon which the buildings were erected. Nor did they prove upon what particular real estate the buildings were situated. The defendant, the Billingsley & Nanson Company, purchased the property within twenty days after the last item of materials was furnished, and a number of other items were also purchased within that time. But there was no proof as to which of the buildings those items went into, and the greater part of the materials was delivered more than ninety days before the purchase, and the statement for the liens was not filed until after the purchase. We are of the opinion that plaintiffs have failed to make a case entitling them to a foreclosure of the lien.

I. The description of the property in the statement is not sufficient. The statute (Miller’s Code, sec. 2133; Laws of 1876, ch. 100, sec. 6) provides that the statement must contain a correct description of the property to be charged. The description “thirty lengths of corn-cribbing at Mills Station” is too indefinite. Such a description in the judgment and execution would not enable the officer, whose duty it would be to execute the writ, to identify the property intended. Any thirty lengths of cribbing at that station would answer the description.

II. If any of the buildings were complete, and none

The State v. Cowan.

of the materials furnished within ninety days of defendants' purchase went into them, they took them discharged of the lien, even if the statement had been sufficient. Miller's Code, sec. 2135; Laws 1876, ch. 100, sec. 9, subdiv. 3. There is no presumption as to which building those materials went into. Neither can it be presumed that some portions of them went into each of them. The burden of proof on those questions was on plaintiffs. They were not entitled, as against the purchaser of the property, to judgment foreclosing the lien upon any of the buildings, without proof that said materials went into them. But they made no proof of that fact. The judgment of the district court will be

AFFIRMED.

THE STATE V. COWAN.

1. **Instructions: BASED ON INCORRECT ASSUMPTION.** An instruction which incorrectly stated that all the evidence against defendant was circumstantial, and another instruction based on such incorrect statement, were properly refused.
2. **Embezzlement: EVIDENCE WARRANTING CONVICTION.** The defendant, who had been county treasurer, was indicted for embezzling the funds of the county. The deficiency, and efforts to conceal the same by fraudulent vouchers and entries were proved or admitted, but defendant sought to shift the responsibility from himself to another, but the jury found against him on that issue. *Held* that there was no such want of evidence to sustain the verdict as to justify this court in setting it aside.
3. **Verdict: EFFECT OF STATEMENTS MADE BY BAILIFF IN JURY-ROOM: PRACTICE: AFFIDAVIT OF JUROR.** Defendant sought to have the verdict against him set aside on the ground that one of the jurors was induced to consent to it, against his judgment, by statements made by the bailiff in the jury-room. *Held* (1) that the affidavit of the juror was not competent to show that his verdict was influenced by the alleged statement (*Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa, 195, 210); and (2) that, since the alleged statements, if made, were not such as, under the facts of the case, might reasonably be supposed to have influenced one or more of the jurors in making up the verdict, the court did not err in refusing to set the verdict aside on account thereof.

The State v. Cowan.

Appeal from Franklin District Court.—HON. H. C. HENDERSON, Judge.

FILED, MARCH 8, 1888.

THE defendant was indicted by the grand jury of Hardin county for the crime of embezzlement. He pleaded not guilty to the charge, and procured a change of place of trial to Franklin county. There he was tried, convicted and adjudged to pay a fine of \$6,154.38, and to be imprisoned in the penitentiary at Anamosa for the term of four years. From this judgment defendant appeals.

George W. Ward and Fred. Gilman, for appellant.

A. J. Baker, Attorney General, for the State.

ROBINSON, J.—I. Appellant complains of the refusal of the court to give instructions asked by him, in language as follows: “(1) There is no positive evidence of the guilt of the defendant in this case. The evidence relied upon by the state to procure a conviction is circumstantial. (2) In order to justify a conviction on circumstantial evidence, the proved circumstances in evidence must not only be inconsistent with the defendant’s innocence, but they must be absolutely inconsistent with any other hypothesis than that of his guilt; and if the circumstances in evidence can be reasonably explained in any manner consistent with the defendant’s innocence, it is the duty of the jury to so construe them, and return a verdict of not guilty. Neither preponderance of evidence nor any weight of preponderant evidence is sufficient in a criminal case, unless it generates a full belief of the guilt of the party charged to the exclusion of all reasonable doubt.” We do not understand that the evidence on the part of the state was wholly, or even in large part, circumstantial. Much of it was positive and direct in support of the material issues presented by the indictment. Hence, the first instruction asked was not true in fact, and was properly refused. The second

1. INSTRUCTIONS:
based on
incorrect
assumption.

The State v. Cowan.

instruction asked was based in part upon the erroneous assertions of the first. The facts of the case did not warrant the giving of the second instruction, even if conceded to be correct in the abstract. "The proved circumstances in evidence" should not have been considered alone by the jury, but rather with all facts, both admitted and proven, which bore directly upon the question of the defendant's innocence or guilt. The jury were properly charged by the court as to the necessity of establishing the guilt of defendant beyond a reasonable doubt before he could be found guilty, and as to what would constitute such a doubt. We do not discover any just ground to complain of the refusal of the court to give the instructions asked.

II. It is said on the part of appellant that the evidence does not justify the verdict; that there is no direct evidence of the conversion of public funds, and no evidence that defendant did not properly account, on sufficient demand, for all moneys he had received in his official capacity. It was clearly shown and not denied that defendant was treasurer of Hardin county during the time in controversy; that, as such treasurer, he had collected a large sum of money which he did not pay over at the end of his official term to his successor in office, and which had not been rightfully paid out previous to the termination of his office; that a settlement of his accounts was made at the close of his term of office, which resulted in the discovery of a large deficiency; that attempts had been made to conceal the deficiency by means of fraudulent vouchers and false representations in the books of his office; and there was evidence which tended to show that defendant was responsible for these illegal vouchers and entries, with fraudulent intent. Other facts which tended to prove the issues on the part of the state, but which we need not specify, were proven. The defendant, who testified in his own behalf, did not deny the deficiency, nor the fraudulent vouchers and entries referred to, but attempted to shift all criminal responsibility for them from himself to another. The jury

2. EMBEZZLEMENT: evidence warranting conviction.

The State v. Cowan.

decided against defendant on that issue, found him guilty as charged, and fixed the amount of the sum embezzled at \$6,154.38. We think their verdict was authorized by the evidence.

III. After verdict, and before judgment, the defendant filed a motion for a new trial. One of the grounds of the motion is alleged misconduct in the jury-room. When the verdict was first returned into court, the jury were polled at the request of defendant. When juror Allinson was reached, he answered, in response to the question, "is this your verdict?" "Well, I agreed to it, but I do not believe the defendant guilty." Thereupon, the court refused to receive the verdict, and the jury retired to their room in charge of a bailiff. Afterwards, and on the same day, the jury returned into court the same verdict. The ground of the motion referred to is supported by affidavits, and resisted by counter-affidavits. Juror Allinson swears that he did in the jury-room, and does now, believe the defendant to be innocent; that he voted for acquittal in the jury-room; also, "that I was influenced in arriving at the verdict of guilty herein; that the bailiff, C. L. Jernegan, at the door of the jury-room, and on this afternoon, a short time before the verdict was returned into court, informed me that the judge of this court said, after we as a jury had once returned into court, and been returned to the jury-room, 'that it was a shame (or words to that effect) that one man should hang out against the eleven.' He also said that he (Jernegan) heard in the court-room that they were going to bring in all the papers and evidence to the jury-room again, and that these statements influenced me to some extent, and considerably, in agreeing to the verdict, as I thought the judge ought to know better than I." Juror Westaby swears that he has read the affidavit of Allinson, and "that the substance of the statements therein made as to Jernegan's statement about the sayings of the court were and are correct." Juror Van Dusen swears that he has read the affidavit of Allinson, and

3. VERDICT :
 effect of state-
 ments made
 by bailiff in
 jury-room :
 practice : aff-
 davit of juror.

The State v. Cowan.

that, "while I cannot give the exact words of the said Jernegan, I know that the substance of what the said affidavit sets forth is true." Juror Porter swears that Jernegan stated to him, after they had been returned to the jury-room, "that the judge of this court said that he never heard of, or never saw, such a case of that kind before;" that this was while they were talking about Allinson's not agreeing with the balance of the jury. In opposition to these affidavits, Jernegan swears that he did not speak to Allinson while the jury were deliberating, and did not, at any time, say to any juror what he is charged with having said in regard to the language used by the court. Each of the jurors, Pearse, Runyan, Jones, James and Wallin, swears that he was in the jury-room when Jernegan was present, at the time of the alleged conversations with Allinson, and that there was not, to his knowledge, any such statements made or conversations had as claimed by Allinson. Also, that, before Jernegan made any statement to the jury, Allinson had agreed to the verdict that was finally returned, and had agreed that he would again return into court and return a verdict of guilty. It will be noticed that no one but Allinson claims to have been influenced by what is alleged to have been said by the bailiff, and Allinson does not claim that his verdict was the result of the bailiff's remarks. But the statements of the jurors are not competent to show that his verdict was influenced by what was said by the bailiff, since that is a matter which necessarily inheres in the verdict. *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa, 195, 210. The material question is: Did the bailiff make such statements to the jurors, or any of them, as under the facts of this case might reasonably be supposed to have influenced one or more of the jurors in making a verdict? The alleged statements had no relation to the merits of the case, and were not of a character which should have influenced a conscientious juror. Allinson alone claims that the statements he heard were made before he had agreed to the verdict, and he claims that by implication, rather than by direct statement.

Corliss v. Conable.

Westaby and Van Dusen do not say whether the statements they claim to have heard were made before or after the verdict had been agreed to. The statement said to have been made to juror Parks had no relation to the merits of the case, and would not naturally tend to affect the verdict. On the other hand, the bailiff positively denies the alleged statements, and his denial is corroborated by five jurors, who also assert that the verdict had been agreed to before the bailiff made any statement to the jury. The claim of Allinson is improbable in itself, and is contradicted by a very decided preponderance of the evidence. We do not think the verdict should be disturbed on this ground.

IV. Other questions are presented by appellant, but, as most of them have been determined by previous decisions of this court, they need not be further considered. It is enough for us to say that we have examined the record, and find no error or defect which affects the substantial rights of the parties.

AFFIRMED.

CORLISS V. CONABLE *et al.*

1. **Practice : FILING PAPERS : WHAT SUFFICIENT.** The depositing of papers with the clerk of a court, as records in a cause, is a legal filing of the papers, whether he indorses them as filed or not. (See *State v. Guisenhause*, 20 Iowa, 227, and *State v. Briggs*, 68 Iowa, 416.)
2. **Appeal : PRACTICE : AFFIDAVITS TO VARY TRANSCRIPT.** Where a transcript filed in this court appears to be full and complete, with a proper certificate to the evidence, and it is duly certified by the clerk of the trial court to be a "full, complete and perfect transcript," it cannot be varied or changed by affidavits of the clerk of the trial court, or others, to the effect that the judge's certificate and the short-hand reporter's extension of his notes have not been filed in the court below.

74 58
92 57

Corliss v. Conable.

8. **Former Adjudication: AS TO WHETHER DEEDS WERE MORTGAGES: FACTS CONSTITUTING.** In 1867, S. was indebted to C., and conveyed to him, by deeds which were absolute on their face, certain lands. A few days afterwards H. recovered judgment against S., and had execution thereunder levied on the land as the property of S. Thereupon C., in an action in which S. was a defendant, enjoined the sale of the land, and H. in his answer set up, among other things, that the conveyances were given only to secure debts, and were mortgages in equity. On this issue the court in that action found for C. against all the defendants, including S. In 1884, S. sought to establish, in this action, that the deeds were mere mortgages, and asked for an accounting. *Held* that the adjudication against him, above referred to, was conclusive as to that point, in the absence of any clear and satisfactory showing that it was obtained by fraud.
4. ——— : **SUFFICIENCY OF ORIGINAL NOTICE.** In such case, the notice addressed to S., in the suit brought by C., stated that the petition demanded an injunction restraining the sheriff from selling the land, and a decree "that the property of C. be not liable for the debts of S." *Held* a sufficient statement to notify S. of the nature of the action, and to bind him by the adjudication that the land belonged absolutely to C.
5. **Specific Performance: ORAL CONTRACT TO RECONVEY: EVIDENCE.** Plaintiff claimed (1) that certain deeds, absolute on their face, made seventeen years before, were mortgages in fact, and (2) that defendant at the time orally agreed to reconvey to her when the debt was paid; but, having failed to establish the first proposition, *held* that she was in no position to ask for a specific performance of the alleged oral agreement.

Appeal from Buchanan Circuit Court.

FILED, MARCH 8, 1888.

THIS is an action in chancery by which the plaintiff seeks to compel the defendant, Rufus Conable, to convey to her certain real estate in pursuance of an alleged oral contract made by said Conable with the plaintiff. After the action had been pending for some time, O. C. Searles was permitted to intervene therein, and filed a petition in which he claimed that certain conveyances made by him to Conable, although in the form of warranty deeds, were in truth and fact mortgages given by him as security for the payment of money owing by him to Conable. He averred in substance that the money which the deeds were given to secure was paid, and that

Corliss v. Conable.

he was entitled to redeem the land. Issues were joined upon these respective claims, and after a full hearing the court dismissed the petition of the plaintiff, and found and decreed that the deeds were in fact mortgages, and that the intervenor had the right to redeem therefrom upon the payment of a certain sum of money. The plaintiff and the defendant Rufus Conable appeal.

Boies, Husted & Boies, for plaintiff.

Lake & Harmon, for Rufus Conable.

Woodward & Cook, for appellee.

ROTHROCK, J.—I. The first question demanding attention is a motion in behalf of the appellee, setting forth that the evidence upon which the cause was tried in the circuit court has not been made of record and certified by the judge who tried the case, and that the appeal should, therefore, be dismissed. An abstract of what purported to be the record and evidence duly certified by the judge was filed by appellants in May, 1887. At the June term, 1887, of this court appellee filed an additional abstract, in which certain amendments were made to the abstract filed by appellants. This additional abstract consisted of some sixteen pages of correction and amendments to the evidence, and it did not deny that the two abstracts completed the record for trial in this court. In August, 1887, appellee served his argument, and preceded it by a short statement called an "additional abstract," denying that the abstracts and amendments contained all the evidence. The motion to dismiss was filed October 3, 1887, and it is founded on an affidavit of the clerk of the court below, to the effect that certain evidence and the certificate of the judge have never been filed in the clerk's office. We have a complete transcript of the case, and, upon an examination thereof, think the cause is properly here for trial, and the motion to dismiss must be overruled. The affidavit of the clerk is to the effect that the judge's certificate was not filed, and that the short-hand reporter's

1. PRACTICE :
filing papers :
what suffi-
cient.

Corliss v. Conable.

extension of the original notes of the evidence has not been filed. He evidently means by this that they are not endorsed as filed. There is no showing that they were not deposited with him as records in the case, and, if they were, this is a sufficient filing. *State v. Guisenhause*, 20 Iowa, 227; *State v. Briggs*, 68 Iowa, 416. Moreover, the clerk authenticated the transcript

2. APPEAL:
practice: aff-
davits to vary
transcript.

with a certificate stating that it is a "full, complete and perfect transcript of the record and pleadings in the cause, as fully as the same remain on file and of record in my office, together with all the original evidence and exhibits offered and introduced in evidence in said action." So far as the transcript appears upon its face, it is full and complete, with a proper certificate to the evidence, and it cannot be varied nor changed by affidavits filed in this court by the clerk or by any other person.

II. The property in controversy consists of a farm situated in Fayette county, and a lot in the city of Independence, Buchanan county. O. C.

3. FORMER adju-
dication: as to
whether deeds
were mort-
gages: facts
constituting.

Searles, the intervenor, was the owner thereof, and in the month of October, 1867, conveyed the same by warranty deeds to the defendant, Rufus Conable. The plaintiff, Lucy H. Corliss, was then the wife of said Searles, and she joined in said conveyance, and thereby released her inchoate right of dower in the lands. Some time after the execution of these conveyances, the plaintiff commenced an action for a divorce from her husband, which action, after pending for some time, came to a final decree, in which the plaintiff was granted a divorce and alimony in the sum of nine hundred dollars, which was fully paid. She has since married one Corliss. Prior to the conveyances in question, Searles and Rufus Conable had been engaged in business together for several years. It does not appear that they were general partners, but they were concerned in joint enterprises in the purchase and sale of live stock. Their business transactions continued for years, and involved the use of considerable sums of money. Searles was at that time addicted to

Corliss v. Conable.

the excessive use of intoxicating liquors, which seriously affected his capacity for business, and in all the joint transactions in which the parties engaged it appears that Conable was regarded, and in fact was, the responsible party, and furnished the money and credit necessary to carry out their joint enterprises. In October, 1867, Searles was indebted to Conable in quite a large amount. Searles, in his testimony in the case, states that the amount of their indebtedness at the time the deeds were made exceeded four thousand dollars. Conable, in his testimony, fixed the amount at between five and six thousand dollars. The deeds were executed, delivered and recorded, and the transaction, upon its face, shows a complete title in Conable, and no claim in the way of any proceeding affecting Conable's title was made by any of the parties until the commencement of this suit in the month of June, 1883, a period of nearly seventeen years after the conveyances were made. The plaintiff claims that at the time the deeds were made Conable entered into an oral agreement with her that, in consideration of her signature to the deeds, he would convey the property to her when the debt from Searles to him should be fully paid. She claims that the debt has been paid by rents arising from the property, and otherwise; or, if not fully paid, she demands an accounting and a sale of sufficient of the property to pay any balance there may be due to Conable, and a conveyance of the residue to her in fulfillment of her alleged oral contract. Conable answered the petition by asserting his absolute ownership of the land under the conveyances, and denying the alleged oral contract. In October, 1884, eighteen years after the deeds were made, O. C. Searles appeared in the action and filed his petition of intervention, in which he claimed that the deeds for the land were intended by the parties thereto as mortgages, and that there was an oral agreement between him and Conable that when the debt was paid Conable was to reconvey the land to him. He alleges that the debt has been paid, and he demands an accounting and a decree for the property. He denies the claim of Lucy

Corliss v. Conable.

Corliss to the land, and demands a decree to the effect that she has no interest in the land. Before these conveyances were made, there was a suit pending in the Buchanan district court by one Hillman against Searles, and a few days after the date of the deed to the Fayette county farm a judgment was rendered in said suit in favor of Hillman and against Searles for the sum of two hundred dollars damages and one hundred and nine dollars costs. Hillman caused a transcript of this judgment to be filed in Fayette county, and an execution to be issued and levied upon the farm, and the same was advertised for sale in payment of the judgment. Thereupon, Rufus Conable filed a petition in the Fayette district court, in which he demanded an order enjoining the sale of the farm on the ground that he was the owner thereof. O. C. Searles was named as a party defendant in the petition, and it was averred therein that Searles had no right, title or interest, legal or equitable, in said land. The record shows that Searles did not appear in the action, and a default was entered against him. Hillman filed an answer in which he claimed, among other things, that the deed was made with intent to hinder, delay and defraud him, by preventing him from collecting his judgment; that the deed was in the nature of a mortgage, and that the amount secured thereby was less than the value of the farm. There was a trial had and a decree upon the merits in favor of Conable and against all of the defendants named in the petition. Searles was a witness for Conable in that suit. It does not appear what his testimony as a witness was. This record was pleaded in the suit at bar as an adjudication of the claim that the deed to the farm was a mortgage. Searles, in reply to the alleged adjudication, denied any knowledge of the service of the original notice upon him in that action, and denied having any knowledge that he was a defendant in the case, and alleged that if any original notice had his signature, accepting service, the same was procured without his knowledge, when he was drunk, by fraudulently representing it to be some other paper. This record was introduced in evidence.

Corliss v. Conable.

It appears therefrom that the name of Searles was signed to an original notice in the suit. It is claimed by counsel for Searles that the original notice upon which his name appears to an acceptance of service was insufficient in stating the nature of the claim to support a decree by default against him. The notice was addressed to Searles, and it stated that the petition demanded an injunction restraining the sheriff from selling certain real estate, and a decree "that the property of Rufus Conable be not liable for the debts of O. C. Searles." It appears to us that this is a pertinent and comprehensive statement of just what the plaintiff in that action demanded in his petition. There can be no doubt that it was as explicit as is demanded by any legal requirement. When this record was pleaded, it was upon its face a full, complete and perfect adjudication between Conable and Searles that the conveyance of the land was absolute, without any condition or reservation, and that Searles had no equity remaining therein. It was incumbent on Searles to show in some legal manner that the decree was not an adjudication against him. This he did not do. Possibly, if he had shown that his signature to the acceptance of service of the original notice was a forgery, he might have avoided the effect of the decree. But this we need not determine. The record was proved by certified copies of the pleadings, original notice and decree. The copies were competent evidence, and it was incumbent on Searles to show that the signature to the original notice was not his signature. It is true, he testified that he never signed any paper in that case but his deposition or written testimony, and that he did not know he was a party to the suit. It is enough to say that, if judgments and decrees are allowed to be collaterally attacked by the oral testimony of unsuccessful parties thereto, after a lapse of some fifteen to eighteen years, it might as well be held that the most solemn records are of no more consequence than the mere memory of men. We think the circuit court should have held that this decree estopped Searles from setting up any claim

that the deed to the farm was intended as a mortgage. This disposes of the claim of Searles to the farm, and it is a most potent factor in determining whether the deed to the lot in Independence was intended as a mortgage. Searles claims that both the deeds were executed under the same arrangement, or contract. It having been judicially determined that one of them was a valid conveyance of a complete title, while it may be true that the two transactions were not so far identical as that an adjudication as to one would be a complete adjudication as to the other, yet, under the circumstances, it would require a very strong showing that the deed to the lot was intended as a mortgage. It would unduly extend this opinion to set out and discuss the evidence on this question. It is very voluminous. In view of the fact that this is an attempt to nullify conveyances of land made many years ago, by parol evidence that the same were intended as mortgages, and in view of the well-known and universally recognized rule of the law that, to effect this, the evidence must be clear, satisfactory and conclusive, we think the intervenor has failed to make such a case as demands any relief from a court of chancery.

III. As we have seen, the claims of plaintiff and the intervenor are antagonistic to each other. They

both agree, however, that the deeds were intended to operate as mortgages to secure the debts due from Searles to Conable. The plaintiff, in her testimony, claims that the land was to be reconveyed to her, and Searles, in his testimony, denies that there was any such contract. It will be observed that the plaintiff's claim is based upon the theory that the deeds were not absolute conveyances of the title. We have found that the evidence fails to show that such was the fact. It is conceded by her counsel that, if the intervenor is entitled to redeem, the plaintiff has no right to any relief. But it is contended that the plaintiff has the right to the specific

5. SPECIFIC performance:
oral contract
to reconvey:
evidence.

Dittoe v. The City of Davenport.

performance of her alleged parol contract if the intervenor has not shown that he has a right to redeem the land. It appears to us that this position cannot be maintained. In order to entitle the plaintiff to the relief demanded, she must establish by clear, competent and satisfactory evidence that the deeds did not invest Conable with the absolute title to the property. We think she has failed to do this, and if she fails in this she cannot claim that, the sales and deeds being absolute, she can enforce an oral promise to convey to her upon the payment of the debt of her late husband. If the conveyances were what they purport to be, there was no such debt to be paid by Searles.

We have disposed of this case without citing authorities. There are but two questions of law involved: (1) The legal effect of the adjudication, and whether the same can be collaterally attacked by Searles, and (2) the character of evidence necessary to overturn an apparently perfect legal and equitable record title to real estate. Both of these rules are so elementary and well understood by the profession, that we have not thought it necessary to do more than state them. The decree dismissing the plaintiff's petition is affirmed, and that part of the decree which permits the intervenor to redeem is

REVERSED.

DITTOE V. THE CITY OF DAVENPORT.

1. **Cities and Towns : SEWER TAX : REGULARITY OF PROCEEDINGS.**
While neither the resolution of the city council ordering the sewer in question, nor the one which assessed the tax therefor, in terms fixed the dimensions of the sewer, nor named the gross amount to be paid therefor, nor the amount of tax to be assessed against each tract of land and the owner thereof, yet, since the street through which the sewer was to be constructed, and the terminal points, were named, and the resolution assessing the tax ordered that it be assessed and levied on each lot, part of lot, or tract of ground, in the sum and to the amount shown by the plat of the city engineer, which plat showed the amount to be assessed to each square foot, the number of square feet in each tract of ground, and the total assessment to each tract of ground subject to be assessed for the sewer, *held* that this was sufficient to render the tax valid.

74	66
86	292
74	66
692	447
74	66
110	471
110	472
74	66
112	315
74	66
117	389
74	66
137	111

Dittoe v. The City of Davenport.

2. — : — : VALIDITY : NOTICE TO TAXPAYER. Where it appears that notice to a taxpayer of the intended assessment and levy of a sewer tax would have been without advantage to him, such want of notice cannot avail as a defense against the collection of the tax.
3. — : — : IRREGULARITIES : RIGHT OF ACTION TO COLLECT. Where a sewer has been constructed, and a tax therefor levied upon adjacent property, the city may recover such tax by action under sections 478, 479, of the Code, notwithstanding formal irregularities and defects in the proceedings, which do not affect the real merits of the case. (Compare *City of Chariton v. Holliday*, 60 Iowa, 895 ; *City of Burlington v. Quick*, 47 Iowa, 228.)
4. — : — : COLLECTION BY WRONG REMEDY : RECOVERY. One who, under protest, pays a sewer tax which he legally owes the city, cannot recover the same from the city on the ground that the remedy used to collect it was not the legal one. (*Winzer v. City of Burlington*, 68 Iowa, 279, distinguished.)
5. — : — : METHOD OF RECOVERY. Sections 478 and 479 of the Code provide a remedy for recovering taxes due a city for the construction of a sewer, which may be adopted at any time after the tax is due,—even after a suit has been brought by the taxpayer to recover such tax paid under protest.
6. — : — : LIMIT OF TWO MILLS ON THE DOLLAR PER YEAR. A sewer tax levied on the real estate fronting on the street on which it is constructed is not invalid because it exceeds two mills on the dollar, and is to be collected in one year, as that limitation of the statute applies only where the city is divided into sewer districts, and where the tax is levied on the property in the district without regard to its location with respect to the sewer.

Appeal from Scott District Court.—HON. A. J. LEFFINGWELL, Judge.

FILED, MARCH 8, 1888.

THE plaintiff seeks to recover a tax alleged to have been paid by his assignor, under protest. The defendant filed an answer in six divisions, the last of which contained a counter-claim for the amount of the tax in controversy, made under sections 478 and 479 of the Code. Plaintiff demurred to the answer. The demurrer was sustained as to the first five divisions, and overruled as to the sixth. Both parties electing to stand on their pleadings, judgment was rendered in favor of

Dittoe v. The City of Davenport.

defendant for costs. Both parties appeal; the appeal of plaintiff being first perfected.

Wm. D. Dittoe, appellant, *pro se*.

L. M. Fisher, for appellee.

ROBINSON, J.—It appears from the facts admitted of record that the tax in controversy was levied under the provisions of an ordinance of defendant, passed by virtue of chapter fifty-four of the Acts of the Sixteenth General Assembly, for the construction of a sewer. The sewer was ordered and constructed during 1878, and the tax in question assessed by resolution adopted November 6 of that year. The plaintiff's assignor, one Dessaint, owned the tract of land on which this tax was assessed, and paid the same, under protest, on the twenty-eighth day of February, 1879. Before payment, the city collector had demanded payment of him, and the land had been advertised for sale, but not sold.

I. It is claimed by plaintiff that the tax was illegal for the reason that the resolution of the city council assessing it did not definitely describe the sewer, nor fix the gross amount of the cost of the same, nor the amount per square foot to be assessed against the adjacent property, or against Dessaint or his property. It is true that neither the resolutions ordering the sewer, nor the one which assessed the tax, in terms fixed the dimensions of the sewer, nor named the gross amount to be paid therefor, nor the amount of tax to be assessed against each tract of land and the owner thereof. But the street through which the sewer was to be constructed and the terminal points were named. The resolution assessing the tax ordered that it be assessed and levied on each lot, part of lot, or tract of ground, in the sum and to the amount shown by the plat of the city engineer. It is admitted that this plat showed the amount to be assessed to each square foot, the number of square feet in each tract of ground, and the total assessment to each tract of ground subject to be assessed for the sewer.

1. CITIES and towns : sewer tax : regularity of proceedings.

Dittoe v. The City of Davenport.

The resolution of the council in effect adopted so much of the plat of the engineer as it referred to, and thereby furnished means of obtaining precise knowledge of the tax assessed to each tract and individual, and the total cost of the sewer. We think this was sufficient for all practical purposes. It is admitted that the amounts so assessed were the proper ones, and that they were duly carried out on the tax-book of the city. We do not think the tax was rendered invalid by the alleged omissions.

II. The most serious objection urged against the tax is that no notice of its assessment and levy were given to Dessaint, and that he had no opportunity to be heard in regard to it.

2. —:—: validity: notice to taxpayer.

The provisions of the ordinance in regard to assessing the tax seem to have been the same as those considered in *Griswald College v. City of Davenport*, 65 Iowa, 635. But our views of this case are such that it is not necessary to determine as to this objection. It cannot be questioned that defendant had the right to construct the sewer at the cost of the owners of the real property fronting on the street through which it was made. To enforce the payment of such cost, it was given a choice of remedies. Ch. 54, and sec. 3, ch. 116, Acts 16th Gen. Assem. The demurrer admits that the sewer was constructed; that its cost was assessed to each tract of ground subject to assessment for the same, according to the number of square feet it contained; that such taxes were duly entered upon the proper tax-books as special taxes for the construction of the sewer; that the amount paid by Dessaint was regularly entered in the proper tax-book against the land owned by him, in accordance with law and the ordinances of the city; and that the amount so paid was the proper portion of said property of the total cost of the sewer. Other allegations are admitted which tend to show that a notice of the intended assessment and levy would have been without advantage to Dessaint. In view of these facts, it is evident that, if the tax was not valid, the invalidity resulted from a merely formal irregularity or

Dittoe v. The City of Davenport.

3. — : — : defect, which did not in any manner affect
 irregularities : the real substantial merits of the case.
 right of action
 to collect. Hence it follows that a right of action, in
 favor of defendant, existed under sections 478 and 479
 of the Code. *City of Chariton v. Holliday*, 60 Iowa, 395 ;
City of Burlington v. Quick, 47 Iowa, 228. The money
 paid by Dessaint was legally due from him to the defend-
 ant, and satisfied a legal and subsisting demand. Even
 if it were true that defendant could not have sold the
 land under the proceedings instituted for the payment
 of the tax, Dessaint was chargeable with
 4. — : — : notice of that fact, and of the further fact
 collection by
 wrong rem-
 edy : recov-
 ery. that the claim was a valid one which the
 city could enforce by proper proceedings.

We do not think that the plaintiff is entitled to recover
 because the city erred in selecting the remedy for
 enforcing collection of his assignor. This case does not
 fall within the rule laid down in *Winzer v. City of Bur-*
lington, 68 Iowa, 279.

III. It is urged by plaintiff that defendant did not
 adopt the provisions of sections 478 and 479 of the Code
 until after this suit was commenced, and it
 5. — : — : seems to be the thought and claim of plain-
 method of
 recovery. tiff that no right could accrue under these
 sections until after their adoption. We do not think
 the position of plaintiff in this regard is well taken.
 The right to recover the money depends upon doing the
 work in the manner and for the purposes authorized by
 law. Sections 478 and 479, referred to, provide a means
 of recovering the money, which may be adopted at any
 time.

IV. It is further objected that the tax was illegal
 because it was to be collected in one year, and exceeded
 two mills on the dollar of the assessed value
 6. — : — : of the property on account of which it was
 limit of two
 mills on the
 dollar per
 year. levied. But the limitation of two mills on
 the dollar of assessed value, to which
 plaintiff refers, applies only where the city is divided into
 sewage districts, and where a sewage tax is levied upon
 the property within such a district, without regard to

Cowles v. Barber.

its location, with respect to the sewer for which it is levied. In this case the cost of the sewer was assessed against the real estate fronting on the street where it was constructed.

V. The counter-claim of defendant shows that the amount it seeks to recover was the amount paid by Dessaint under the circumstances we have already considered. That payment satisfied the claim, and it is not necessary for us to further consider it, nor the objections made to its payment.

It follows, from what we have said, that the action of the court below in sustaining the demurrer as to the first four divisions of the answer, and overruling it as to the sixth, was erroneous. This case is, as to both appeals,

REVERSED.

COWLES V. BARBER *et al.*

Fraud: RESCISSION OF CONVEYANCE PROCURED BY. Defendant, by fraudulent representations as to the value of certain Texas land-scrip certificates, induced plaintiff to convey to him certain real estate and personal property in exchange for four of said certificates. The certificates were practically worthless, and plaintiff was substantially so informed through a letter received by him from the commissioner of the Texas land-office before the trade was consummated; but defendant produced such other evidence of the value of the certificates that plaintiff, not unreasonably, believed his statements rather than those of the land commissioner. *Held* that the conveyance was properly set aside in equity, and a judgment entered in plaintiff's favor for the damages sustained by him on account of the fraud.

Appeal from Decatur Circuit Court.—HON. JOHN W. HARVEY, Judge.

FILED, MARCH 8, 1888.

THIS is an action in equity by which the plaintiff seeks to set aside and cancel a conveyance of a farm made by him to the defendant, A. J. Barber, and for

Cowles v. Barber.

damages, upon the ground that he was induced by certain fraudulent representations to make said conveyance, and to pay to said Barber a certain amount of money, and to convey and deliver to him certain other property. There was a trial by the court, and a decree for the plaintiff. Defendant appeals.

Phillips & Day, for appellants.

Bullock & Hoffman, for appellee.

ROTHROCK, J.—In July, 1883, the plaintiff and the defendant Barber entered into a written contract by which Barber agreed to assign and transfer to the plaintiff four land-scrip certificates of six hundred and forty acres each, which purported to be good for location on any of the vacant, unreserved and unappropriated lands of the state of Texas. In payment for these certificates the plaintiff agreed to convey his farm of one hundred acres, situated in Decatur county, and valued at fifteen hundred dollars, and four town lots in the town of Leon at four hundred dollars; one horse at one hundred dollars; one wagon at sixty-five dollars,—and pay four hundred and seventy-five dollars in money. In about a month after the written contract was entered into, it was fully complied with by the parties thereto. Within a short time thereafter the plaintiff commenced this action to set aside the conveyance of the land, and for damages, upon the ground that Barber committed a most gross fraud in procuring the plaintiff to enter into the contract; that said fraud consisted in representing to the plaintiff that said scrip, which was railroad land scrip, could be laid upon lands in Hall, Motley and Tom Green counties, in the state of Texas, and that said lands were desirable lands and favorable to locate upon, and that said scrip could be located in either of said counties. In an amendment to the petition, it was averred that Barber falsely represented to the plaintiff that said land-warrants could be located upon land in Hall, Motley or Tom Green counties, in the northern part of Texas. In a further amendment to the petition,

Cowles v. Barber.

which was made after the evidence in the case was introduced, it was alleged that, in addition to the fraudulent representations theretofore pleaded, the said Barber, for the purpose of inducing the plaintiff to enter into the contract, represented to the plaintiff that said land-scrip certificates were reasonably worth the sum of six hundred and forty dollars each, and that said Barber knew that the plaintiff was buying said certificates that he might locate the same upon lands for his own occupancy. All of these representations were alleged to be false, and it was averred that the defendant well knew they were false when they were made. The defendant Barber took issue upon the averments of the petition and its amendments, and, after a full trial upon a great volume of evidence, the district court found the equities of the case with the plaintiff, and entered a decree in his favor. A reversal of the decree is asked because it is not sustained by a preponderance of the evidence.

There are some things which the evidence shows beyond any controversy. A most material fact is that at the time the contract was made these land certificates were not worth to exceed thirty-five dollars each. The defendant had been engaged in dealing in them for two years, and must be presumed to have been well advised as to their value. The plaintiff had no knowledge upon the subject when the negotiations for the trade were commenced. The result of these negotiations was that he gave to the defendant property and money to the value of twenty-five hundred and sixty dollars in exchange for property which was worth in the market not to exceed one hundred and five dollars. The evidence is abundant that this was the market price of these certificates in the state of Texas, where they appear to have been issued almost without limit. There is no question made as to the value of the property which plaintiff paid for these certificates, and it is a most significant fact that the value corresponds exactly with the representation which the plaintiff claims the defendant made as to the value of the four certificates. That the plaintiff was practically cheated and defrauded of his

property can admit of no doubt. The question is, has he any remedy or right of redress? It is claimed by counsel for appellant in argument that there was much incompetent and inadmissible evidence taken by the plaintiff and submitted to the court. This evidence in part consisted of the testimony of some two or three neighbors of the plaintiff, to the effect that they had been imposed upon by the defendant by the same representations of which the plaintiff complains. This was incompetent as original evidence in the case. The plaintiff had no right to show that the defendant was guilty of the same fraud with others as that by which plaintiff was cheated. It is claimed by appellee that this evidence was proper as an impeachment of the defendant, and when he was examined as a witness his attention was called to the fact as to whether he made the alleged representations to the said witnesses. He denied having made them. There is some question in our minds as to whether this would be proper for consideration, even as impeaching evidence, and we have disregarded it in determining the rights of the parties.

The plaintiff claimed in his evidence that the defendant directed him to go to the county surveyors of the counties in Texas and procure them to locate the lands. The plaintiff introduced in evidence letters from a large number of such surveyors, in which it was stated in substance that the certificates could not be located on land in their counties. We have not considered these letters as competent evidence. We do not regard it as necessary to determine their competency. It is claimed by plaintiff's counsel that they are competent, because they are reports from the very persons to whom defendant referred the plaintiff for information upon the subject to which they relate. Whether this position be correct we do not determine, and we, therefore, leave them out of consideration.

We come now to the question as to whether the plaintiff was cheated and defrauded by the defendant, or, as claimed by the defendant, did the plaintiff perform his contract with his eyes open, and without any

Cowles v. Barber.

of the alleged frauds having been committed by the defendant? Probably the strongest ground of defense is the fact that before the plaintiff closed the trade he wrote a letter to the commissioner of the general land-office of the state of Texas, and received a reply thereto, in which it was stated that there was "very little good, vacant and unappropriated land in this state upon which land scrip can be located." It is strenuously contended by counsel for appellant that the plaintiff, having closed up the contract after he received this information, cannot be heard to complain. The position of counsel is that a party cannot rescind a contract or recover damages on account of false and fraudulent representations, unless he relied upon and was misled by the representations to his injury; and, as plaintiff was advised that there was very little good land in Texas upon which the certificates could be located, it cannot be said that he was deceived by the alleged false representations, of the defendant. It appears from the evidence that Barber ascertained in some way that this letter was in the postoffice at Davis City. He induced the postmaster to deliver it to him, and he carried it to plaintiff's residence, some three or four miles distant. The plaintiff and Barber each read the letter. Now, if the plaintiff, after reading this letter, voluntarily, and without any interference from Barber, proceeded to perform the written contract, there would be much ground for holding that he cannot be heard to say that he was deceived by Barber's previous representations that the certificates could be conveniently located on good land. But we think the evidence shows that Barber did interfere, and by persuasion induced the plaintiff to accept his statements rather than those of the land commissioner. The plaintiff so testified as a witness, and says that "Barber claimed to be so positive it [the land] was there, and had told me that these surveyors of each county knew all about the land matters in their respective counties, and he [Barber] claimed to know,—and I supposed he knew, perhaps, as well as the commissioner; and as I

Cowles v. Barber.

had noticed nothing particularly crooked in his dealings, I believed he told me the truth substantially." Now, it is true that Barber denies that he attempted to influence the plaintiff on that day. But he does not deny that he told him previously that there was abundance of good land upon which the scrip could be located. That he made such representations is not a disputed fact in the case. In his examination as a witness, he conceded that he may have, in making this trade, used a written instrument of which the following is a copy :

"Eagleville, Harrison Co., Mo., June 6, 1883.

"This is to certify that I purchased from A. J. Barber three land-scrip certificates for six hundred and forty acres each, issued to the Missouri, Kansas & Texas Railroad Company of Texas, dated September 22, 1880, and numbered 442, 443 and 444, and that I have just returned from Texas, where I have made a personal examination of the lands in northern central Texas, and find it a beautiful, healthful and rich country, unsurpassed as a grazing and stock country, and very productive farming and fruit country, and the climate is magnificent; water and timber in abundance; and I consider the railroad lands, upon which the land-scrip certificates can be located, worth from \$2 to \$3.50 per acre.

"BENJAMIN HILL.

"Attest: WILLIAM HILL."

It is not surprising that the plaintiff should believe the defendant, armed as he was with such appliances as this, as helpers to the successful prosecution of his business, rather than the letter received from the commissioner of the land-office. There can be but little doubt that the statement of the commissioner was true, and, if true, the defendant was guilty of the fraudulent representations of which the plaintiff complains. Indeed, he insists now that these certificates could have been located on good land. He still takes issue with the commissioner. In our opinion, the statement of the commissioner, coupled with the fact that these certificates had but a nominal value, is a complete refutation

The State v. Maher.

of the claim that they could have been located on land worth two or three or even one dollar an acre. If there is any land in Texas of any value upon which they could have been located, they would not be upon the market at thirty-five dollars for six hundred and forty acres. It appears from a report of the commissioner of the general land-office of the state of Texas that the excess of these certificates over the public lands subject to entry by them approximates seven millions of acres. The wonder is that they are worth thirty-five dollars each. If they could be used in entering land worth one dollar an acre, their value would approximate that sum. But we need not further elaborate the case.

We think the decree ought to be

AFFIRMED.

THE STATE V. MAHER *et al.*

1. **Criminal Practice : SETTING DAY FOR TRIAL : DISCRETION OF COURT.** The time during the term at which a defendant shall be put upon his trial rests wholly upon the sound discretion of the judge, and unless an abuse of such discretion, with prejudice to the defendant, be shown, as is not done in this case, this court will not interfere.
2. ——— : **ORDER OF EVIDENCE TO REBUT ALIBI.** Where defendant had sought to establish an *alibi*, it was proper to admit, in rebuttal, testimony tending to show defendant's presence at the time and place of the crime, in support of evidence given in chief on that point.
3. ——— : **INSTRUCTION AS TO USE OF EVIDENCE.** Where counsel for defendant offered certain evidence for a certain stated purpose, but the court excluded it for that purpose, but admitted it for another purpose, it was not error to instruct the jury to consider it only for the purpose for which it was admitted.
4. ——— : **ALIBI : EVIDENCE : INSTRUCTIONS NOT CONTRADICTIONARY.** The court instructed that the *alibi* relied on as a defense must be established, if at all, by a preponderance of the evidence ; also, that if upon the whole evidence, including that tending to establish the *alibi*, they entertained a reasonable doubt, they should acquit. *Held* that these instructions were not contradictory or misleading, but that they were harmonious and correct.

74	77
78	877

74	77
81	42

74	77
111	710
111	711
111	712
111	713

74	77
115	457
116	458
74	77
135	722

74	77
136	606

The State v. Maher.

5. ——— : ——— : INSTRUCTIONS AS TO EVIDENCE. The court instructed as follows: "The defense of *alibi*, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place, so far away or under such circumstances that he could not, with ordinary exertion, have reached the place where the crime was committed, so as to have participated in the commission thereof;" and "If the proof of *alibi* fails to show as to either defendant on trial, you will not consider it as to him; but if it does show as to either, you will give it full consideration as to the defendant of whom it so shows." *Held* that the instructions rightly stated the law, and were not subject to the objection that they directed the jury not to consider the evidence pertaining to the *alibi*.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, MARCH 8, 1888.

McHenry, McHenry & McHenry, for appellant.

A. J. Baker, Attorney General, for the State.

BECK, J.—The objections to the conviction of defendant will be considered in the order of their discussion by his counsel.

I. The attorney for the prosecution, when the case was called for trial in the court below, moved for a continuance, or that the trial be set down for a later day of the term, on the ground that a witness examined before the grand jury was not in attendance. The application was supported by the affidavit of the attorney, showing the fact that he had been unable to procure the attendance of the witness and that he expected to procure his attendance, and showing the facts he expected to prove by him. The motion was sustained so far as to pass the case for three days. The action of the court is not shown to be erroneous. The time during the term at which a defendant shall be put upon his trial rests wholly upon the sound discretion of the judge. He has such full knowledge of the condition of the business of the court, and the facts upon which the term of trial ought to be fixed, that we cannot interfere unless an abuse of discretion,

1. CRIMINAL
practice: set-
ting day for
trial; discre-
tion of court.

The State v. Maher.

and prejudice resulting to defendant, be shown. There is nothing before us justifying even a suspicion of either.

II. A witness, called by the state in rebuttal, was permitted to testify, against defendant's objection, that ^{2. — : order of evidence to rebut alibi.} he had seen defendant on the night of the larceny near the place where it was committed and heard two shots fired, and to some other circumstances connected therewith. Counsel for the state insist that this evidence, being in rebuttal, was erroneously received. The defense relied upon was an *alibi*, and, as we understand the case, the evidence in question was admitted to rebut defendant's evidence in support of this defense. It cannot be doubted that the state is not required to introduce evidence in chief which shall contradict testimony afterwards given by the defendant, tending to show that, at the time of the crime, he was at another place. If this were so, the state would be bound to contradict testimony of the defendant before it was given and before it was known what would be given upon the defense, or, in fact, that any evidence at all would be given in support of it, or that it would even be made and relied upon. It is plain that the state may in rebuttal support the proof before given of defendant's presence at the time and place of the crime, and contradict testimony tending to prove an *alibi*. The statements of the witness as to shots fired and other matters were properly permitted, as they were circumstances connected with the fact stated that he had seen the defendant at the time, and they served to identify the time and place, and support the testimony of the witness. Circumstances of this kind are proper to test the memory of the witness, to fix his attention, and to verify the truth of his statements. We conclude that the evidence was rightly admitted.

III. The defendant introduced evidence tending to show that the house where the crime was committed was of bad reputation. In an instruction the ^{3. — : instruction as to use of evidence.} jury were directed that this evidence could be considered to determine whether the

The State v. Maher.

larceny was committed with violence, or whether the violence was for some other purpose. Counsel objected to the instruction, on the ground that the evidence was admitted to affect the credibility of the witness. It is true that the counsel, when the evidence was offered, claimed that it was introduced for that purpose, and the court overruled an objection thereto by the state. But the reason of the admission of the evidence given by the court was substantially the same as that stated in the instruction. It does not appear to be erroneous, and we will not reverse for the reason that the jury were not informed, in connection with it, that they should consider it to determine the credibility of the witness.

IV. It is urged that the verdict is contrary to the evidence and instructions. We think differently. Certain it is that the verdict is not so unsupported by the evidence as to authorize us to interfere.

V. The court below, in one or more instructions, directed the jury, in substance, that the *alibi* relied upon as a defense must be established, if at all, by the preponderance of the evidence. Another instruction directs the jury, in effect, that if upon the whole evidence, including that tending to establish the *alibi*, they entertained a reasonable doubt, they should acquit. Counsel for defendant insist that these instructions are contradictory and misleading. We are of the opinion that they harmonize, and each and all, considered together, accord with doctrines recognized by this court. Under these instructions the jury are required to find the *alibi* upon the preponderance of the evidence, but if a reasonable doubt of defendant's guilt remains in their minds after weighing all the evidence, they must acquit. They cannot acquit on the defense of the *alibi* unless it is supported by the preponderance of the evidence. But if the evidence upon that defense, considered alone or in connection with all other evidence, leaves a reasonable doubt in the minds of the jury, they cannot convict. The instructions accord with the doctrines of

4. — : alibi :
evidence :
instructions
not contra-
dictory.

The State v. Maher.

this court pertaining to the subjects of *alibi* and reasonable doubt.

VI. Counsel for defendants question the doctrines recognized by this court as to preponderance of proof required to sustain an *alibi*. They concede that it has been adopted and followed by many decisions of this court. The instructions given in this case upon the subject follow those decisions. We discover no reasons for now overruling them, and a majority of the court remain well satisfied of their correctness. We do not think it would be profitable to repeat here what this court has said in prior decisions upon the subject.

VII. An instruction (the seventh) is in the following language:

“The defendants claim, as one of their defenses, what is known in law as an *alibi*; that is, at the time
3. —: —: instructions as to evidence. the robbery with which they are charged was being committed, they were at a different place, so that they could not have participated in its commission.

“The burden is upon each defendant to prove this defense for himself, by a preponderance of evidence; that is, by the greater and superior evidence.

“The defense of *alibi*, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place, so far away or under such circumstances that he could not with any ordinary exertion have reached the place where the crime was committed so as to have participated in the commission thereof.

“If the proof of *alibi* fails to show as to either defendant on trial, you will not consider it as to him; but if it does so show as to either, you will give it full consideration as to the defendant of whom it so shows.”

Counsel for defendant understand that the court below, in the third and fourth paragraphs of the instruction, in the use of the words “consideration” and “consider,” directed the jury that they should not consider the evidence pertaining to the *alibi*. But the

The State v. Maher.

language will bear no such interpretation. The words are applied to the defense of *alibi*, and not to the proof tending to establish it. Of course, if the *alibi* is not established by a preponderance of the evidence, it is not to be considered as proved. It must have no consideration by the jury in controlling their finding upon that defense. The last paragraph of this instruction is doubtless incorrectly set out in the abstract, as it is not grammatical. It doubtless reads as given as follows: "If the proof fails to show the *alibi* as to either defendant," etc. But, as it appears in the abstract, it presents the same thought, though not so clearly. It surely does not convey the idea, as claimed by counsel, that any evidence tending to prove the *alibi* is not to be considered.

VIII. The third paragraph of the seventh instruction is complained of. We think it correct. If the proof shows that defendant, at the time of the commission of the offense, was so near the place of the offense that under ordinary circumstances he could have been present and participated therein, it would fail to establish the *alibi*. It is plain, therefore, that to sustain the defense he must show that he was so far away that under the circumstances proved he could not have been present at the time and place of the crime. This is just what the court directs the jury in the instruction complained of by counsel.

This discussion disposes of all questions argued by counsel. The judgment of the district court is

AFFIRMED.

THE STATE V. MAHER *et al.*

1. **Appeal : EVIDENCE TO SUPPORT VERDICT.** Since it cannot be said that there was such a want of evidence in this case that the jury, in the exercise of their discretion, could not have found the defendants guilty, this court cannot reverse the judgment for a want of evidence.
2. **Criminal Law : ALIBI : INSTRUCTIONS AS TO EVIDENCE.** (*State v. Maher, ante, p. 77, followed.*)
3. **Appeal : OBJECTIONS TO EVIDENCE NOT URGED BELOW.** Where evidence is objected to below on a certain stated ground, another ground not so stated cannot be urged on appeal.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, MARCH 8, 1888.

THE defendants were indicted and convicted of robbery. They now appeal to this court.

McHenry, McHenry & McHenry, for appellants.

A. J. Baker, Attorney General, for the State.

BECK, J.—I. Defendants' counsel first object that the verdict of the jury is not supported by the evidence.

1. APPEAL: evidence to support verdict. All that need be said upon this point is that the evidence is, to some extent, conflicting, and is not wholly certain in connecting the defendants with the crime. But it cannot be said that it is so wanting in this regard that the jury, in the proper exercise of their discretion, could not have found the defendants guilty. We cannot, therefore, interfere with the verdict.

II. The defendants relied upon an *alibi* as a defense. As applicable thereto the district court gave certain instructions *like*, if not *verbatim* copies of the instructions given in the preceding case of *State v. Maher*, *ante*, p. 77. The same objections to the instructions urged in that case are urged in this. We need not repeat what we have said in the prior case upon the objections to these instructions. We again hold them to be correct.

III. The prosecuting witness was permitted to testify in his re-direct examination that another person on the night of the crime had given the names of defendants, who were then suspected. The evidence was properly admitted by the court below, for the reason that inquiries as to the names of the parties he suspected were made by defendants' counsel upon the cross-examination, and the evidence was proper to explain why the witness charged defendants with the crime. Counsel insist that the

2. CRIMINAL law: alibi instructions as to evidence.

3. APPEAL: objections to evidence not urged below.

Davis v. Kimball.

question in response to which the evidence was given was leading. But no such objection was made at the time it was asked. If subject to objection on this ground, it was waived by a failure to make it when the error, if any, could have been corrected.

No other questions arise in the case. The judgment of the district court is

AFFIRMED.

DAVIS V. KIMBALL *et al.*

Venue : SUIT AT WRONG PLACE AS TO TWO OF FIVE COUNTS : CHANGE OF VENUE : EXPENSES. This action, in five counts, was brought in the district court at Avoca, but the court would have had no jurisdiction at that place (it not being the county-seat) of the causes of action set up in two of the counts, had they stood alone. Defendants moved that as to these two counts the cause be removed to Council Bluffs, which was the county-seat and the place of their residence, and that they be allowed compensation for trouble and expense in attending at the wrong place. *Held* that the motion was properly overruled on both points, and that their proper remedy, if they were not willing to try the whole case at Avoca, was to move to strike out those counts of which the court had no jurisdiction.

Appeal from Pottawattamie District Court.—HON. GEORGE CARSON, Judge.

FILED, MARCH 9, 1888.

THIS is an action at law, and was brought in the district court at Avoca, in Pottawattamie county. The petition contains five counts, three of which were upon promissory notes made payable, at Avoca, to the order of J. W. Davis, and by him transferred to the plaintiff. The other two counts were for the wrongful conversion of certain property and money of the plaintiff by the defendants. The defendants, who reside in the city of Council Bluffs, appeared and made an application for a change of the place of trial of the demands set forth in the said last two counts. They also demanded a reasonable compensation for trouble, expenses, etc., for being

 Griffith v. The Chicago, B. & P. Ry. Co.

compelled to appear at Avoca. The plaintiff filed objections to the application for a change of the place of trial, and on the same day dismissed that part of the action contained in said two counts. Afterwards the court overruled the application, and refused to allow the defendants any compensation. Defendants appeal.

Fremont Benjamin and Finley Burke, for appellants.

Turner, Smith & Cullison, for appellee.

ROTHROCK, J.—The defendants did not demand that the venue of the whole suit or action be changed. They could not rightfully do this, because the court at Avoca had jurisdiction of the action so far as it related to the promissory notes payable at Avoca. They demanded that the petition should be divided, and part of the claims should be tried at one place and part at another. This they had no right to require. They were rightfully in court at Avoca on that part of the suit which was brought upon the promissory notes. If they did not desire to try the other counts of the petition, then they should have moved to strike them from the petition. But the plaintiff saved them that trouble by striking them out on her own motion.

This is all there is of the case. We need not determine the other questions discussed by counsel.

AFFIRMED.

GRIFFITH V. THE CHICAGO, BURLINGTON & PACIFIC
RAILROAD COMPANY *et al.*

74	85
88	235
74	85
d108	527

Railroads : AUTHORITY OF PRESIDENT. The president of a railroad company has no power, by virtue of his office simply, to let a contract in behalf of the company for the construction of its road, when the same is already under contract made by its board of directors. (*Templin v. Chicago, B. & P. Ry. Co.*, 73 Iowa, 548, followed.)

Appeal from Jefferson Circuit Court.

FILED, MARCH 9, 1888.

THIS is an action in equity to recover a balance alleged to be due the plaintiff for work done by him in the construction of a railroad, and to establish and foreclose a mechanic's lien on the property. The circuit court entered judgment dismissing the petition, and plaintiff appeals.

Jones & Fuller, for appellant.

Cook & Clements and *R. A. Sankey*, for appellees.

REED, J.—Plaintiff claims to have done the work under a contract with the New Sharon, Coal Valley & Eastern Railroad Company, the agreement being entered into on the part of the corporation by S. C. Cook, its president. The name of the corporation was subsequently changed to the Chicago, Burlington & Pacific Railroad Company. The evidence shows that the work was in fact done under a contract entered into by plaintiff with Cook; but defendants claim that the latter was acting for the Trunk Line Construction Company, and that consequently plaintiff was a subcontractor. If that claim is true, it is conceded that plaintiff cannot recover as against these defendants, for the reason that he did not take the steps requisite to preserve his lien as against them. The evidence leaves little doubt, we think, but that plaintiff understood, when he entered into the contract with Cook, that the latter was representing the railroad company; and if Cook had been clothed with power to contract for that company, it probably would have been bound by the contract. But there is no evidence that he had that power, and it is shown that the board of directors of the company had already entered into a contract with another person for the performance of the same work, and that that contract had been transferred to the Trunk Line Construction Company, which company has been paid for the

 Logan v. Samsel.

work. The case, in its facts, is like *Templin v. Chicago, B. & P. Ry. Co.*, 73 Iowa, 548, in which we held that the president of a railroad company does not have power, by virtue of his office merely, to bind the company by a contract for the construction of its railroad. That holding is conclusive of the rights of these parties.

AFFIRMED.

LOGAN V. SAMSEL.

74 87
d112 513

Procedure : ON WRIT OF ERROR : FINAL JUDGMENT. Where, in an action in a justice's court, there was judgment against plaintiff on a counter-claim, but it was set aside on plaintiff's motion, and defendant sued out a writ of error thereon,—whether the court, in sustaining the writ of error, properly rendered final judgment for the defendant, instead of sending the case back to the justice for further proceedings, depends upon circumstances which are not shown by the record, and so the action of the court in so doing must be affirmed. The fact that the plaintiff, after the writ of error had been sued out, perfected an appeal to the same court, which was pending therein when the writ of error was adjudicated, was not proper to be considered.

Appeal from Buena Vista District Court.—HON. GEO. H. CARR, Judge.

FILED, MARCH 9, 1888.

THIS action originated before a justice of the peace, where there was a judgment in favor of the defendant, upon a counter-claim. On the plaintiff's application, the judgment was set aside. The defendant sued out a writ of error from the district court, which, upon a hearing, was sustained. The court entered a judgment affirming the original judgment entered by the justice of the peace. Plaintiff appeals.

Sweeley & Slocum and *I. W. Bane*, for appellant.

Robinson & Milchrist, for appellee.

ROTHROCK, J.—The amount in controversy is less than one hundred dollars, and the appeal comes to us upon the following certificate of the trial judge: “Where a judgment has been rendered against the plaintiff in an action before a justice of the peace, and the justice sustains a motion of plaintiff, filed under section 3543 of the Code, and the defendant sues out a writ of error from the district court, alleging in his affidavit therefor that the justice erred in sustaining said motion; and where, upon hearing in the district court, the writ of error is sustained, and it appearing of record that subsequent to the suing out of said writ of error, and within twenty days from the rendition of the said judgment by said justice, the plaintiff had filed his appeal bond, and perfected his appeal of said case to the district court, and it was pending therein for trial, has the defendant the right to elect whether he will have the case returned to the justice for further proceedings, or have final judgment entered in his favor in the district court at the time of the ruling upon the writ of error? And did the court err in sustaining the judgment of the justice of the peace, and rendering final judgment thereon?” It does not appear from the certificate upon what ground the district court sustained the writ of error. The presumption must be entertained that it was for the reason that the judgment originally rendered by the justice of the peace was valid, and that the plaintiff had no right to have it set aside or annulled. If so, it would seem to follow that final judgment should be rendered in the district court. It is impossible to determine from the certificate whether the court erred in rendering final judgment. There may be cases where such a judgment should not be rendered, and where the successful party on the hearing on the writ of error would have no right to demand that judgment be rendered in the district court; and again, there may be cases,—as where there appears to be no further right to a trial,—where the successful party would have such right; and, for aught

McReynolds v. McReynolds.

that appears in this certificate, this is just such a case. We do not think the fact that plaintiff appealed after he succeeded in having the judgment set aside is of controlling importance in the case. He made his election as to his remedy against the judgment, and at his application it was set aside. The question presented to the court on the writ of error involved the correctness of that determination of the case. He had no right in that proceeding to seek an adjudication of his right to an appeal from the original judgment. So far as we are advised from the certificate, we think the district court correctly determined the case.

AFFIRMED.

ROBINSON, J., having been of counsel in the case, takes no part in the decision of this case.

McREYNOLDS v. McREYNOLDS *et al.*

1. **Equity Jurisdiction: PARTNERSHIPS.** Partnerships, and the question of their existence, are matters of which chancery has jurisdiction (*Aultman v. Fuller*, 53 Iowa, 80; *Richards v. Grinnell*, 63 Iowa, 44); and where such an issue is raised, it is not improper to transfer the cause to the chancery docket for determination.
2. **Continuance: NO RULING ON MOTION: APPEAL.** A continuance was asked on a showing of sickness, which was clearly insufficient. Afterwards additional affidavits were filed, but no ruling was made on the amended showing. *Held* that it could not be said that any error was in this committed by the court.
3. **Appeal: EXCLUSION OF EVIDENCE: NO EXCEPTION TAKEN.** Objections to the exclusion of evidence cannot be heard when made for the first time in this court.
4. **Decree: IN EXCESS OF ISSUES: NO PREJUDICE.** A decree which goes beyond the question submitted to the court is erroneous in that respect, but where such error is not prejudicial to appellant, it is no ground of reversal. In this case appellant has leave to have the decree amended, at his costs, upon the remanding of the cause.

Appeal from Wapello District Court.—HON. E. L. BURTON, Judge.

FILED, MARCH 9, 1888.

THIS action is to recover certain personal property, or the value thereof, to which plaintiff claims she is entitled as the widow of her deceased husband, Solomon McReynolds, who owned it at his death. The cause was transferred to the chancery docket, and upon a trial as an equity action a decree was entered therein granting the relief prayed for by plaintiff. Defendants appeal.

W. W. Cory, D. C. Beaman and J. B. McCoy, for appellants.

H. B. Hendershott and McNett & Tisdale, for appellee.

BECK, J.—I. The plaintiff claims the property as the widow of her deceased husband. The defendant denies that she has any interest in it, for the reason that she relinquished all claims to it by an ante-nuptial agreement or marriage settlement, executed between her and her husband. Defendant M. M. L. McReynolds, a son of plaintiff's deceased husband, in his answer, claims that he owns an undivided one-third of the property, he and his father owning it at the death of the latter as partners. In an amended petition the plaintiff prays that, if it be found and determined that defendant has an interest in the property, it be partitioned and divided, and that she shall have other relief to which she may be entitled in equity. After the amended petition was filed, the cause was transferred to the chancery docket for trial. It was tried upon the issue involving the question whether the property was owned by defendant and his father as partners, which was regarded by the court below as an equitable issue, and it was found that no partnership existed, and a decree was rendered so declaring, upon a finding that the property belonged exclusively to the father. After this decree was rendered, the cause was retransferred to the law docket for the trial of the issues cognizable at law.

McReynolds v. McReynolds.

II. Defendants complain of the order of the court below transferring the cause to the chancery docket, on the ground that there was no issue of equitable cognizance requiring such transfer. It will be observed that the pleadings put in issue the existence of the partnership, and the plaintiff prayed that, if it be found to exist, she have appropriate relief. Partnerships, and the question of their existence, are matters of which chancery has jurisdiction. 1 Story, Eq. Jur., sec. 659. This doctrine has been frequently recognized by this court. See, among other cases, *Aultman v. Fuller*, 53 Iowa, 60, and *Richards v. Grinnell*, 63 Iowa, 44.

III. Counsel for defendants, when the cause was called for trial, asked for a continuance, on the ground of the absence of defendant M. M. L. McReynolds, on account of sickness. The showing upon the motion when first made was not sufficient, for the reason that the sickness of the defendant was shown in no other manner than by a letter written by a stranger. Afterwards an additional showing was made by affidavits, but there was no ruling upon the motion as supported by such showing. There is no ground to hold that the court below erred in overruling the motion for a continuance.

IV. The case was tried upon written evidence under a stipulation of the parties. But defendants offered the oral testimony of certain witnesses, which was not received, on the ground of the stipulation, or for some other reasons. No exception was taken to the ruling against the admission of this testimony. Objections thereto cannot, therefore, be first heard in this court.

V. It is urged that the decree goes beyond the question submitted to the court, in that it declares that all of the property belonged to defendant's father. If counsel's position be correct, it is no ground for reversing. As to defendants,

1. EQUITY jurisdiction: partnerships.

2. CONTINUANCE: no ruling on motion: appeal.

3. APPEAL: exclusion of evidence: no exception taken.

4. DECREE: in excess of issues: no prejudice.

Neff v. Beauchamp.

the decree is binding, but as to those not parties it has no such effect. But it is doubtless better that the decree should simply declare that defendant has an interest in the property as a partner of his father. It may be so amended, upon the cause being remanded, without costs to plaintiff, for we do not discover that this objection was made in the court below.

VI. Upon the merits of the case the evidence is conflicting. There is much positive and direct evidence tending to show that the father and son were partners as to the property in controversy ; but there is more in support of plaintiff's claim that the father was the sole owner. The evidence is conflicting, and much of it is irreconcilable. We are quite clear in the opinion that the preponderance is with plaintiff. We are not accustomed, in cases of this character, to discuss the evidence at length. No profit would result therefrom to the parties or the profession.

We reach the conclusion that the decree of the court ought to be, as above suggested,

MODIFIED AND AFFIRMED.

NEFF V. BEAUCHAMP.

DIVORCE : DECREE IN NEBRASKA WITHOUT JURISDICTION : COLLATERAL ATTACK IN IOWA. In an application by plaintiff for the admeasurement of his dower in his deceased wife's land, it was alleged in answer that his wife had been divorced from him by a decree rendered in Nebraska. *Held* that it was competent for him to assail the decree by showing that it was rendered without jurisdiction, and that a demurrer to a reply setting up facts showing such want of jurisdiction was properly overruled. (See authorities cited in opinion.)

Appeal from Page District Court.

FILED, MARCH 9, 1888.

THIS is an action for the admeasurement of dower, or the setting apart of the distributive share of the husband in the real estate of his deceased wife. There was a petition, answer and reply. A demurrer to the reply was overruled, and defendant appeals.

Neff v. Beauchamp.

J. L. Bachelor, for appellant.

No appearance for appellee.

ROTHROCK, J.—It is averred in the petition that the plaintiff and one Sarah A. Griffith were married in March, 1869, and that the marriage relation existed between them until February, 1887, when she died, seized in fee of certain land; that defendant claims an interest therein, but that such interest is inferior to plaintiff's distributive share or dower right, which he prays may be admeasured and set off to him. The defendant, by his answer, denied that the marriage relation existed between plaintiff and Sarah A. Griffith at the time of her death. He averred that on the fifth day of December, 1885, the said Sarah, who was then the wife of the plaintiff, was divorced from him in the district court of Antelope county, Nebraska, and that in September, 1886, the said Sarah and the defendant were married and continued to be husband and wife until her death. To this answer the plaintiff replied as follows: "That said alleged divorce, if granted, is void as against his claim for dower, for the reason that said alleged divorce was obtained by fraud in this: that neither Sarah A. Neff, nor plaintiff herein, were at any time residents of Nebraska; nor was their marriage solemnized in that state; refers to section seven, chapter thirty-six, Statute of Nebraska, requiring six months' residence of applicants to obtain a divorce, when the marriage was not in that state; that said Sarah, for the purpose of obtaining a divorce, temporarily left her residence in Page county, and went to Antelope county, Nebraska, and there located till December, 1885, then returned to Page county; that plaintiff had no knowledge of such divorce proceedings, and did not appear therein. Denies that defendant was lawfully married to said Sarah A. Neff. Prays that the Nebraska divorce be held null and void, as far as plaintiff's claim in this suit is concerned. Denies that the Nebraska court had jurisdiction of such divorce suit, because of the alleged

Neff v. Beauchamp.

fraud." The demurrer is to the effect that the district court in Nebraska, having heard and passed upon the sufficiency of the evidence of said applicant for divorce, and her residence in that state, that court had jurisdiction of the suit; and that the record and judgment of that court cannot be questioned in a collateral proceeding.

We have set out the reply in full, because, for the purposes of the demurrer, the material averments of the reply must be taken to be true. We have, then, this question: The laws of Nebraska required a residence of six months, in order to acquire the right to make application for a divorce. The said Sarah left her home in this state, and went to Nebraska temporarily *and for the purpose of obtaining* a divorce, and, when it was procured, she returned to Iowa. In the case of *State v. Fleak*, 54 Iowa, 429, the defendant was indicted for the crime of adultery. He offered in evidence a judicial decree of the territory of Utah, which showed that he had been divorced from his wife in the year 1877. Thereupon the state offered evidence to the effect that the defendant during the year 1877 was a resident of the state of Iowa, and that for ten years preceding 1879 he was a resident of Iowa, except about seven months during the year 1873. It was held that this was proper evidence, upon the ground that it is competent to establish by parol that a judgment or decree rendered in another state is void for want of jurisdiction in the court rendering it. That case would seem to be decisive of this. If the court rendering the decree had no jurisdiction, the decree was absolutely void from the beginning. *Whitcomb v. Whitcomb*, 46 Iowa, 437; *State v. Whitcomb*, 52 Iowa, 85. And in *Thompson v. Whitman*, 18 Wall. 457, it was held that a judgment of a state court may be collaterally assailed in the court of another state by showing that it was rendered without jurisdiction.

The demurrer to the reply was correctly overruled.

AFFIRMED.

GOOLD V. LYON COUNTY *et al.*, and nine other like cases.

Taxation : TOWNSHIP BOARD OF EQUALIZATION : INCREASING ASSESSMENT OF LAND IN EVEN-NUMBERED YEARS. From a comparison of various sections of the Code cited in the opinion, it is *held* that the board of equalization of a township, town or city has no authority, in the even-numbered years, to add to or change the assessed value of real estate as established in the next preceding odd-numbered years, in which alone such property is assessable ; and where such change was attempted, the collection of the additional taxes arising from an increase of the assessed value was properly enjoined. [BECK, J., *dissenting.*]

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, MARCH 9, 1888.

PLAINTIFF is the owner of certain real estate in the town of Rock Rapids. The town was incorporated in November, 1885. The real estate in the town was assessed for taxation in that year by the assessor of the township in which the town is situated ; plaintiff's property being assessed at eight hundred and forty dollars. The town council, acting as a board of equalization, in 1886, assumed to equalize the assessment of the real estate of the town. By their action, plaintiff's assessment was increased to eighteen hundred and sixty-three dollars, and those of the plaintiffs in the other cases were also increased in various amounts. The assessor returned this action of the council to the county auditor, who carried the amount of the assessment as corrected onto the tax-books for that year, and the taxes were then entered on the basis of such assessment. Plaintiff brought this action to restrain the collection of that portion of the amount so entered which is in excess of the sum which would accrue on the assessment as made by the assessor in 1885. The district court entered a

Goold v. Lyon County.

decree in accordance with the prayer of the petition. Defendants appeal.

Van Wagenen & McMillen, J. M. Parsons and S. K. Tracy, for appellants.

E. C. Roach and J. F. Eccleston, for appellees.

REED, J.—A number of questions have been argued by counsel, which, in the view we take, are not material, and need not be considered in determining the case. The question on which the rights of the parties depend is whether the board of equalization has the power to equalize the assessment of real estate at any time except during the year in which the assessment is made. It is provided by statute (Code, sec. 812) that “real estate shall be listed and valued in the year 1873, and each second year thereafter.” The board of equalization is constituted by section 829 of the Code, and its powers and duties are defined by that and the following section. They have power to increase or diminish the valuation of any piece of property, or the entire assessment of any taxpayer, as they may deem just and necessary for an equitable distribution of the burden of taxation upon all the property of the township. They also have power to add to the assessment, as returned by the assessor, any taxable property in the township not included therein. It is provided by section 830 that said board shall meet for that purpose on the first Monday in April of each year, and continue from day to day until completed. If the question was to be determined from a consideration of this provision alone, it may be that its language is broad enough to warrant the construction contended for by appellants; but, when it is borne in mind that personal property is to be listed and valued every year, it is apparent that the provision which requires the board to meet and act in each year is not necessarily conclusive of the question before us. And there are other considerations and provisions which we think are controlling. It is made the duty of the assessor to return to the county auditor, on or before the

Goold v. Lyon County.

third Monday in May of each year, one of the assessment books showing the assessment of the property of each taxpayer, after the same has been corrected by the township board of equalization." Code, sec. 825. The board of supervisors constitutes a county board of equalization, and, at the regular meeting in June of each year, they are required to equalize the assessment of the several townships, cities and incorporated towns of their county. Sec. 832. The executive council constitutes the state board of equalization. They are empowered to "add to the aggregate valuation of real property of each county, which they shall believe to be valued below its proper valuation, such percentage in each case as will raise the same to its proper valuation," and to "deduct from the aggregate valuation of each county, which they shall believe to be valued above its proper valuation, such percentage in each case as will reduce the same to its proper valuation." And they are required to meet for that purpose on the second Monday in July, in each year in which real property is assessed (sec. 834), and, after their work of equalization as between the counties is finished, the state auditor is required to transmit to the county auditor a statement of the percentage to be added to or deducted from the valuation of real property in his county. And it is the duty of that officer to add or deduct from the valuation of each parcel of real property in his county the required percentage. Sec. 836. And it is on the valuation as thus determined that the taxes are levied. It thus appears that the valuation of real property for purposes of taxation is not definitely and finally determined until the state board of equalization has acted; and when it has acted, and its action has been certified to the county auditors, the valuation thus established necessarily becomes the basis of taxation until another assessment and another equalization can be had. If it were otherwise, it would result that the equality of valuation, which the statute was intended to effect as between the counties by the action of the state board of equalization,

Goold v. Lyon County.

might be entirely destroyed, in the years in which real property is not assessed, by the action of the township boards. For, if they may change, add to or diminish the assessment in one individual case, they may in all others, and thus it might happen that the grossest inequality might be created in those years, for which, as the state board is by implication forbidden to take any action in those years, there would be no remedy. The present case affords a good illustration of the practical workings of the system, if the law is as claimed by appellants. There were four hundred and thirty individual assessments in the town, and of these, four hundred and six were changed by the action in question, and the aggregate amount of the assessments was affected to the amount of many thousands of dollars, and is sufficient to entirely destroy the equality created by the action of the state board in 1885 between that and the other counties of the state. It is entirely clear, we think, that the legislature never intended that such a result should be brought about. The fact that the state board is required to meet for the purpose of equalizing the assessments of real estate only in those years in which real property is assessed, shows conclusively that the intention of the legislature was that the valuation placed upon the property under their action should afford the basis for taxation during the biennial period.

We think the judgment of the district court is right, and it will be affirmed, and the same order will be made in each of the other cases.

AFFIRMED.

BECK, J., dissenting.

Gamble v. Mullin.

74 99
130 318GAMBLE V. MULLIN *et al.*

1. **Negligence : INSTRUCTIONS : PARTIAL STATEMENT OF ISSUES.** In an action based on negligence, where the answer charged plaintiff with contributory negligence, it was error, in stating the issues to the jury, to omit the issue of contributory negligence. (See cases cited in opinion).
2. ——— : **INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE.** In such case, the jury were instructed that if the injury complained of was caused by defendants' negligence, and plaintiff did not, by any negligence of his own, contribute to the injury, they should find for the plaintiff ; but in at least two paragraphs of the charge they were told, without qualification, that plaintiff was entitled to recover if the injury was the result of defendants' negligence ; and in no part of the charge were they plainly told that contributory negligence on plaintiff's part would defeat his recovery. *Held* that the charge did not sufficiently state the law on this point.
3. ——— : ——— : **BURDEN OF PROOF.** In such case, it was not sufficient to instruct that plaintiff had the burden to prove the negligence alleged by him, as it was incumbent on him, also, to prove himself free from contributory negligence, even though such negligence was charged upon him in the answer. (See cases cited in opinion).
4. **Damages : MEASURE OF : INJURY TO MARE IN BREEDING.** In an action for an injury to a mare in breeding her, caused by the alleged negligence of defendants, and resulting in her death, the measure of plaintiff's damages was her value at the time of the injury (*Gardner v. Burlington, C. R. & N. Ry. Co.*, 68 Iowa, 592) ; and it was error to admit evidence of resulting injury to her sucking colt, no such claim having been pleaded.

Appeal from Henry Circuit Court.—HON. W. J. JEFFRIES, Judge.

FILED, MARCH 9, 1888.

PLAINTIFF seeks to recover damages for the death of a mare, alleged to have been caused by negligence and want of skill on the part of defendants. The case was tried to a jury, and a judgment rendered in favor of plaintiff on the verdict. The defendants appeal.

Woolson & Babb, for appellants.

L. G. & L. A. Palmer, for appellee.

ROBINSON, J.—The plaintiff claims that he caused a mare to be served by a stallion kept by defendants, and that, in consequence of negligence and want of skill on the part of the defendants' groom, an injury to the mare resulted, from the effects of which she died. The defendants deny that any injury was caused by want of care and skill on their part, and aver that, if the mare sustained any injury from the service in question, the plaintiff caused the same, or contributed thereto.

I. Defendants complain that the court failed to instruct the jury properly in regard to the issue of contributory negligence. The charge of the court stated a part of the issues, but failed to inform the jury that plaintiff was charged with having caused or contributed to the injury and damage sustained. That this was a material issue in the case cannot be denied. It was, therefore, error in the court to omit reference to this when stating the issues to the jury. *Owen v. Owen*, 22 Iowa, 270; *State v. Brainard*, 25 Iowa, 572; *Potter v. Chicago, R. I. & P. Ry. Co.*, 46 Iowa, 399; *Hill v. Aultman*, 68 Iowa, 630. The jury were told that if they believed "that the injury was caused by carelessness and negligence of the defendants in charge of the stallion owned by defendants, and that the plaintiff did not, by any negligent act, contribute to the injury of the mare," their verdict should be for the plaintiff. But they were also told, in at least two paragraphs of the charge, without qualification, that the plaintiff is entitled to recover if the injury was the result of carelessness or negligence on the part of defendants. It is true that, in the paragraph of the charge first referred to, the jury were told that the plaintiff could recover in the case stated if he had not contributed to the injury, but it is not stated in any part of the charge that contributory negligence on the part of

1. NEGLIGENCE:
instructions:
partial state-
ment of issues.

2. NEGLIGENCE:
instructions
as to contrib-
utory negli-
gence.

Gamble v. Mullin.

plaintiff would prevent his recovery. In the third paragraph of the charge the jury are told that the burden
 3. —: —: of proving negligence rests upon the party
 burden of alleging it. We do not understand this to
 proof. be correct, as applied to plaintiff in this case. It was incumbent upon plaintiff to prove himself free from negligence, notwithstanding the fact that negligence on his part was stated in the answer. As bearing upon these questions, see *Price v. Mahoney*, 24 Iowa, 582; *Muldowney v. Ill. Cent. Ry. Co.*, 32 Iowa, 178, 180; *Rusch v. City of Davenport*, 6 Iowa, 451; *Donaldson v. Miss. & Mo. Ry. Co.*, 18 Iowa, 289; *Greenleaf v. Ill. Cent. Ry. Co.*, 29 Iowa, 46; *Baird v. Morford*, 29 Iowa, 536; *Reynolds v. Hindman*, 32 Iowa, 148; *Patterson v. Burlington & M. R. Ry. Co.*, 38 Iowa, 279; *Murphy v. Chicago, R. I. & P. Ry. Co.*, 45 Iowa, 663; *Bonce v. Dubuque Street Ry. Co.*, 53 Iowa, 280; *Hawes v. Burlington, C. R. & N. Ry. Co.*, 64 Iowa, 318.

II. The plaintiff was permitted to prove, against the objection of defendants, that the death of the mare was an injury to her colt, then about one
 4. DAMAGES: measure of: month old, and the amount of such injury.
 injury to mare in breeding. In this we think there was error. Injury to the colt is not named in the petition, and the proof as to the amount of damage should have been confined to the value of the mare at the time of the injury. 2 Sedg. Dam. 731, note; *Gardner v. Burlington, C. R. & N. Ry. Co.*, 68 Iowa, 592. It is claimed on the part of appellee that the evidence objected to was offered only to show the value of the mare. The questions objected to and the answers do not sustain that theory. They were directed to the alleged injury to and value of the colt. We are satisfied the amount of damage allowed by the jury was not based entirely upon the value of the mare at the time of the injury.

III. Other errors assigned and argued relate to matters not likely to be involved in another trial, and need not be determined by us. For the errors pointed out, this case is

REVERSED.

SCHABEN V. BRUNNING & SON.

1. **Appeal : EVIDENCE TO SUPPORT VERDICT.** Where the evidence is conflicting, this court will not interfere with a verdict on the ground that it is not sustained by the evidence.
2. **Consideration : SETTLEMENT OF CLAIMS.** A settlement of conflicting accounts is a valid consideration for an agreement to pay a balance found due one of the parties.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, MARCH 9, 1888.

ACTION to recover for goods sold and delivered. Defendants admit the claim of plaintiff, and plead counter-claims. Verdict and judgment for defendants. The plaintiff appeals.

Macomber & Son, for appellant.

E. M. Betzer and J. M. Drees, for appellees.

ROBINSON, J.—I. The chief controversy in this case is over the liability of plaintiff for certain goods sold and delivered, but which, he insists, were never purchased or received by him, and for which he never agreed to pay. The evidence tends to show that these goods were, in fact, sold and charged to a brother of appellant. It appears that appellant and this brother were for several years engaged in the milling business under the firm name of Schaben Bros. While they were so engaged, they sold to defendants merchandise to the amount of \$1,045.76. During the same time, defendants sold to Schaben Bros. lumber and wheat to a considerable amount. They had given their note to one of the defendants. The goods in controversy had been sold, and defendants seemed to

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Schaben v. Brunning & Son.

claim that both plaintiff and his brother were liable for their price. In January, 1884, all the members of the firm of Schaben Bros. and C. Brunning & Son met and attempted to settle their respective claims. It is insisted by defendants that this was accomplished; that the claim for the goods in controversy was included; and that a balance of \$245.36 was found, and agreed by all of the persons aforesaid to be due the defendants. It is further claimed that plaintiff and his brother agreed to give their note at a later date for this agreed balance. The note was not given, and the settlement and agreement are denied by plaintiff. The evidence is conflicting, and that given on the part of the defendants is not altogether satisfactory. But we are not prepared to say that there was not sufficient evidence to sustain the verdict.

II. Appellant insists that there was no consideration for his alleged promise to pay the balance found to be due the defendant on settlement. If
2. CONSIDERATION: settlement of claims. there was a settlement of accounts and claims between the parties, the agreement as to what were the rights and liabilities of the several parties would be a sufficient consideration for a promise to pay the balance found to be due the defendants. The failure to give the note as agreed would not defeat the settlement.

III. It is claimed by appellant that the court below erred in certain rulings made during the introduction of evidence on the trial. We do not think this claim is well founded.

AFFIRMED.

74	104
91	611

74	104
117	647

74	104
119	447

**THE CLINTON NATIONAL BANK V. STUDEMANN ;
INGWERSEN, Intervenor.**

1. **Sale: DELIVERY: SUBSEQUENT LEVY WITH NOTICE.** Defendant sold and delivered the cattle in question to intervenor, who at once delivered them back to defendant, to be cared for until the following Monday, and then driven to B., which services defendant was to perform for intervenor as part of the contract of sale. *Held* that this sale was valid as against defendant's creditors, on whose behalf the sheriff, with notice of the facts, levied on the cattle as the property of defendant, while they were yet in his possession.
2. **Garnishment: AGREEMENT TO PAY DEFENDANT'S DEBT: STATUTE OF FRAUDS: RIGHTS OF GARNISHEE.** S. sold cattle to I., and as a part of the purchase price I. orally agreed to pay a debt of five hundred dollars owing by S. to another. *Held* that such agreement was not within the statute of frauds, and that I., when garnished as a debtor to S. for the price of the cattle, should have been permitted to retain out of the purchase price the five hundred dollars which he had so agreed to pay to another, as he was legally holden to such other party therefor.
8. **Appeal: FOUNDATION FOR: DEMAND IN LOWER COURT.** When a party to an action has once properly demanded a right which has been denied him by order of the court, he is not required to make the same demand, in substance, a second time, in order to be entitled to an appeal.
4. **—: KIND OF PROCEEDINGS: INTERVENTION IN ATTACHMENT.** A proceeding by intervention in an attachment suit, under section 3016 of the Code, is not necessarily of an equitable nature, and cannot be so regarded on appeal when not so treated in the court below.

Appeal from Clinton District Court.—HON. A. J.
LEFFINGWELL, Judge.

FILED, MARCH 9, 1888.

ON THE eighth day of January, 1887, the plaintiff commenced its action against defendant. A writ of attachment was issued, and on the ninth and tenth days

The Clinton Nat'l Bank v. Studemann.

of January, 1887, the sheriff levied the same upon a large amount of property, including that in controversy, and garnished the intervenor. The plaintiff subsequently filed a supplemental petition, in which he asked that the sheriff be appointed receiver of the attached property, with authority to convert the same into money, and that all attachment liens be preserved against the money received, the same as against the property. Plaintiff also asked that the money realized by the sheriff be used in paying costs and expenses, and the claims of attaching creditors, in the order in which they were levied. On the day this supplemental petition was filed, Ingwersen filed his petition of intervention, in which he claimed to be the owner of the property in controversy. He alleges that he purchased it on the eighth day of January, 1887, at the homestead of defendant, to be delivered at Bryant, Iowa, and that, as a part of the consideration of purchase, the intervenor assumed and agreed to pay to Ingwersen Bros., of Chicago, five hundred dollars, which amount was then owing to them for money loaned to defendant for the purpose of fattening the eighteen steers and one cow which constitute the property in controversy; that said cattle were then and there turned over to intervenor by defendant, and were immediately placed back in the hands of defendant to be taken care of, and driven to Bryant on the following Monday; that three or four days later, and after the levy, intervenor wrote to Ingwersen Bros., informing them that he had assumed the payment of said debt. Intervenor also alleges that the sheriff received notice before levying on these cattle that intervenor had so purchased them. He asks that the sale to him be recognized and carried into effect, and that the sheriff and receiver be authorized to accept so much of the contract price as should remain after deducting the five hundred dollars to be paid to Ingwersen Bros. A demurrer to the petition of intervention was interposed. On the hearing of the supplemental petition, the several attaching creditors were represented. The sheriff was appointed

The Clinton Nat'l Bank v. Studemann.

receiver of all the personal property taken under the several writs of attachment, including the property in controversy, and directed to sell and convert it into money. At the same time the demurrer was sustained in part. Intervenor electing to stand upon his petition, judgment was rendered, requiring the receiver to carry out the sale to intervenor, and requiring the latter to pay to the receiver the whole amount of the contract price, to be held subject to the further order of the court. In case the intervenor should fail to consummate said sale, and pay the contract price, within three days after demand, then the receiver was to sell the property at public auction, and to hold the proceeds subject to the order of the court. The intervenor appeals.

Robert T. T. Spence, for appellant.

Geo. B. Young and Hayes & Schuyler, for appellee.

ROBINSON, J.—I. The first question we are required to determine is the validity of the sale to intervenor.

1. SALE: delivery: subsequent levy with notice. The petition of intervention alleges an agreement of purchase, and an actual delivery of the property thereunder. The demurrer admits these allegations to be true. The agreement of purchase, and the delivery thereunder, constituted a valid and completed sale. It is true that, after the property was delivered, it was returned to defendant to be cared for, and driven to market on a subsequent day; but it does not appear that defendant retained any interest in the cattle, or right to their possession, adverse to intervenor. He was under obligation to care for the cattle, and drive them to the place named. But these acts were required to complete his part of the bargain, and were for the benefit of the intervenor. The sheriff had notice of these facts, and notice to him at the time of the levy was notice to the plaintiff. Therefore, the fact that defendant had actual possession of the cattle when the sheriff levied upon them is not prejudicial to intervenor, and he is entitled to the cattle or their proceeds, subject to whatever

The Clinton Nat'l Bank v. Studemann.

rights plaintiff may have acquired under the garnishment proceedings.

II. It is insisted, on the part of appellee, that appellant has no interest in prosecuting this appeal, for the reason that the judgment ratifies the sale, and only requires him to pay the contract price. It is also claimed that the contract, so far as it requires intervenor to pay anything to Ingwersen Bros., cannot be enforced, for the reason that, being an agreement to pay the debt of another, it was not in writing, and hence is within the statute of frauds. We do not think the position of appellee is well taken. The obligation of intervenor to pay the five hundred dollars was an original undertaking on his part, entered into for his own benefit. It was not only not within the statute of frauds, but was a contract which Ingwersen Bros. could have enforced by direct proceedings against intervenor (*Johnson v. Knapp*, 36 Iowa, 616, and cases therein cited; *Morrison v. Hogue*, 49 Iowa, 574); and it would be no defense to such proceedings that intervenor had paid the money into court in obedience to a judgment to which Ingwersen Bros. were not parties. The intervenor did not object to the application for a receiver, nor to the sale by him of the property, but asked that he be permitted to retain of the purchase price the amount he had agreed to pay the creditors of defendant. In other words intervenor asked that his liability as garnishee be limited to the amount of his indebtedness to defendant, and to that we think he was entitled.

III. It is said the money is subject to the order of the court, and that appellant should apply for an order, for the relief to which he is entitled. But he has made application for this relief once, and was denied. He is under no obligation to make a further attempt.

IV. Appellant insists that this is an equitable action. We do not understand upon what ground this

2. GARNISH-
MENT: agree-
ment to pay
defendant's
debt: statute
of frauds:
rights of gar-
nishee.

3. APPEAL:
foundation
for: demand
in lower
court.

Dows & Co. v. Dale.

4. —: kind of claim is based. The proceeding of appellant proceedings: is under section 3016 of the Code. There intervention in attachment are no facts which require relief which a court of equity alone can give, and the case was not treated as in equity in the court below. We do not think the claim of appellant in respect to this matter can be sustained.

For the error in sustaining the first part of the demurrer to the petition of intervention the case is

REVERSED.

DOWS & CO. V. DALE *et al.*

Tax Sale : FOR DELINQUENT PERSONAL TAXES NOT CARRIED FORWARD :
ENTRIES IN BOOK NOT KNOWN TO LAW. Certain delinquent taxes upon personal property were not carried forward on the regular tax-lists, as provided by section 845 of the Code, but were entered by the treasurer in a separate book which he kept for the purpose, but which was unknown to the law. Afterwards the person who was liable for the taxes sold to plaintiffs, who had no actual knowledge or notice of such taxes, certain land on which they would have been a lien had they been properly carried forward. *Held* that the entries in the book above referred to did not impart constructive notice to plaintiffs of its contents, and that a subsequent sale of the land for such taxes was void.

Appeal from Adams District Court.—HON. R. C. HENRY, Judge.

FILED, MARCH 9, 1888.

ACTION in equity. Certain real estate was sold for delinquent taxes, and this action was brought to redeem from such sale. The relief asked by the plaintiffs was granted, and the defendants appeal.

H. F. Dale and *Burg Brown*, for appellants.

T. M. Stuart, for appellees.

SEEVERS, C. J.—I. This case was submitted upon the pleadings and an agreed statement of facts, and therefrom we find that in 1879 R. B. Johnson owned the lands in controversy, and was a member of the partnership of Grant & Johnson. On the twenty-second day of June, 1882, R. B. Johnson conveyed the

74	108
90	429
74	108
112	330

Dows & Co. v. Dale.

lands to George Johnson. On the twenty-sixth day of said month the plaintiffs caused the lands to be attached to secure an indebtedness due the plaintiffs from Grant & Johnson. A judgment was recovered in such action in 1884, the land sold and purchased by the plaintiffs, and in December, 1885, it was conveyed by the sheriff to the plaintiffs, and afterwards, in December, 1886, George Johnson conveyed by quit-claim deed all his right, title and interest in such land to the plaintiffs. In 1880 and 1881 a personal property tax was assessed and levied against said partnership, and the land in question was sold in 1887 for delinquent taxes levied thereon in 1885, and also for said personal taxes levied in 1880 and 1881 against Grant & Johnson. Said taxes on personal property "were never carried forward, and do not appear on any subsequent tax-list of said county, against or opposite the lands in controversy, nor against R. B. Johnson," except that the treasurer in 1882 made a "separate book, in which he entered the delinquent personal taxes which appeared in the tax duplicates for 1880 and 1881, which shows the name of the person so taxed and the amount thereof, and the page on which said taxes appeared on the tax-lists in his office." The plaintiffs, at the time they purchased the land in controversy, at "sheriff's sale, and from George Johnson, had no knowledge or notice of said personal taxes except the constructive notice arising from the record and entry of such taxes as hereinbefore stated." Such are the material facts.

II. The book prepared by the treasurer, in which he entered the delinquent personal property taxes, is one unknown to the law, and, therefore, it cannot be assumed that the plaintiffs had any knowledge of such book, and they were not bound by its contents. It clearly appears that the personal property taxes were not carried forward as provided in Code, section 845, and, therefore, the sale for such taxes is invalid. *Cummings v. Easton*, 46 Iowa, 183; *Harwood v. Brownell*, 48 Iowa, 657; *Jiska v. Ringgold County*, 57 Iowa, 630.

Haskell v. The City of Des Moines.

The plaintiff has the right to redeem, upon payment of the taxes levied on the real estate, and the costs, penalties and interest as provided by law; and, as the district court so held, the judgment must be

AFFIRMED.

74	110
108	427

74	110
113	277

HASKELL V. THE CITY OF DES MOINES.

1. **Appeal: EVIDENCE TO SUPPORT VERDICT.** Since this court is not able to conclude that the jury, in the honest, intelligent and unbiased exercise of their discretion, were not justified by the evidence in finding for the plaintiff, their verdict cannot be disturbed.
2. **Cities and Towns: DEFECTIVE SIDEWALK: EVIDENCE.** In an action to recover for an injury caused by a defective sidewalk, evidence that the walk "tipped" or inclined to one side was material and competent, especially as the injury occurred at a time when it was covered with snow and ice.

Appeal from Polk District Court. — HON. M.
KAVANAGH, Judge.

FILED, MARCH 9, 1888.

ACTION to recover for injuries sustained by a fall caused by the defective and unsafe condition of the sidewalk of a street in the defendant city, upon which plaintiff was walking. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Detrick & McMartin and *Hugh Brennan*, for appellant.

Phillips & Day and *George R. Sanderson*, for appellee.

BECK, J.—The objections pointed out in the assignment of errors and argued by defendant's counsel are wholly based upon the alleged insufficiency of the evidence to support the verdict, and certain rulings made in the admission of evidence.

Lindsay v. The City of Des Moines.

I. It may be that the evidence does not, to the mind of all the members of this court, seem to fully justify the verdict, or that, if we were charged with the duty of finding a verdict, it would be the other way; but we are charged with no such duty, and can only inquire whether the jury, in the honest, intelligent and unbiased exercise of their discretion, were justified by the evidence in finding for plaintiff. We are unable to conclude that they were not.

II. The petition alleges that defendant was negligent in failing to construct and keep the sidewalk upon which plaintiff fell in a safe condition for persons passing thereon. A witness was permitted to testify that the sidewalk inclined to the right or left, described by the word "tipped" used by the witness. The evidence was objected to on the ground that it was incompetent and immaterial. Certainly an inclined or "tipped" sidewalk may be dangerous, and for that reason it would be negligent to so construct or maintain it, or permit it, through want of repairs, to remain in that condition. It would be more dangerous when covered with snow and ice, which was shown to be the case when plaintiff fell. We are of the opinion that the evidence was competent and material. These considerations dispose of the questions raised and discussed in the case. The judgment of the district court is

AFFIRMED.

LINDSAY V. THE CITY OF DES MOINES.

74 111
111 550

1. **Practice : IMPROPER REMARKS TO JURY : ORAL DISAPPROVAL BY COURT : NO PREJUDICE.** Counsel for defendant, in argument to the jury, made unwarranted statements to the jury, to which counsel for plaintiff objected, and the judge stated orally, in the presence of the jury, that he would instruct the jury not to consider such statements; but he failed to so instruct. *Held* that the omission was not reversible error, as the jury would not, after hearing what was said, consider the statements referred to.

Lindsay v. The City of Des Moines.

2. **Cities and Towns : DEFECTIVE SIDEWALK : INSTRUCTIONS.** In an action for an injury on a defective sidewalk, the court instructed that "the city is not an insurer of the safety of persons traveling upon its sidewalks." *Held* no error, when followed immediately by the words, "and is only liable when injuries are incurred without fault of the person injured, and because of negligence on the part of the city."
3. **Instructions : WHOLE CHARGE CONSIDERED.** A defect in any part of the charge to the jury will not be ground for reversal when it is clear from the whole charge that the jury could not have been misled thereby.
4. **Cities and Towns : DEFECTIVE SIDEWALK : DUTY OF CITY : INSTRUCTION.** In an action for an injury on a defective sidewalk, the effect of one of the instructions was that the city could not be justified in keeping the walk in an "unreasonably dangerous" condition. *Held* that, while the language was not well chosen, it was not misleading, in view of the whole charge.

Appeal from Polk Circuit Court.—HON. JOSIAH GIVEN,
Judge.

FILED, MARCH 9, 1888.

ACTION to recover damages for an injury received by the plaintiff, caused by the accumulation of ice and snow on the sidewalk in the city. Trial by jury. Verdict and judgment for the defendant. The plaintiff appeals.

Henry S. Wilcox, for appellant.

Detrick & McMartin and *Hugh Brennan*, for appellee.

SEEVERS, C. J.—I. During the argument to the jury, counsel for the defendant stated: "You have a right to consider that the city of Des Moines had two hundred miles of sidewalk which had to be looked after as much as this where Mrs. Lindsay fell;" to which counsel for the plaintiff objected, and the judge stated orally "that he would instruct the jury not to consider any remarks as to the number of miles of sidewalk in said city," and thereupon defendant's counsel desisted from further statements of that nature; but the court

1. PRACTICE:
Improper
remarks to
jury: oral dis-
approval by
court: no pre-
judice.

Lindsay v. The City of Des Moines.

failed to so instruct the jury in writing. It is insisted that what was said by counsel is clearly prejudicial error, in view of the fact that on a former appeal it was held that the court erred in admitting evidence as to the extent of the sidewalks in the city. *Lindsay v. City of Des Moines*, 68 Iowa, 368. It will be observed that when the remarks were made by counsel the court, in the presence of the jury, said he would instruct the jury to disregard such remarks. This amounted to a condemnation of what counsel had said, and the jury would certainly understand that the statements of counsel were improper, and should not be considered. The fact that the court failed to so instruct the jury in writing is immaterial. Under the circumstances, we do not believe what was said by counsel constitutes reversible or prejudicial error.

II. The third paragraph of the charge is lengthy, but the court, among other things, said that "the city is not an insurer of the safety of persons traveling upon its sidewalks." It is not claimed that this is not the law, but that there was no such issue, and, therefore, what the court said was "impertinent and uncalled for." Immediately following, and as a part of the same sentence, the court said, "and is only liable when injuries are incurred without fault on the part of the person injured, and because of negligence on the part of the city." In our opinion this instruction states the law correctly, and was not impertinent or uncalled for. 2 Dill. Mun. Corp., sec. 1019.

III. The court stated the issues to the jury fully and correctly, and that the plaintiff claimed to recover because snow and ice were permitted to accumulate on the sidewalk; but in the fifth paragraph of the charge stated that large quantities of snow were permitted to accumulate on the sidewalk. Because of the omission of the word "ice" from this paragraph, it is said the plaintiff was greatly prejudiced. But we do not think so. Taking the whole

2. CITIES and
TOWNS:
defective
sidewalk:
instructions.

3. INSTRUCTIONS:
whole charge
considered.

 Johnson v. Leffingwell.

charge of the court together, it is perfectly clear to our minds that the jury could not have failed to understand that if the city negligently permitted snow and ice to accumulate on the sidewalk, and the plaintiff, without negligence on her part, by reason thereof, fell and was injured, she was entitled to recover. Therefore, no prejudice resulted because of the omission of the word "ice" from the fifth paragraph of the charge.

IV. The court said to the jury: "If you have found that the plaintiff was injured * * * because of the negligence of the city * * * you will consider the duty of the city with respect to its sidewalks, whether the walk at the place of the accident was in an unreasonably dangerous condition. * * *" Complaint is made of the words "unreasonably dangerous." The thought of the court no doubt was that the walks must be kept in a reasonably safe condition, and, if not so kept, it necessarily follows that the walks were in an unreasonably dangerous condition. While this language cannot be commended, we do not think its use constitutes error. The jury without doubt clearly understood from the whole charge upon what the liability of the city depended.

4. CITIES and
towns:
defective
sidewalk:
duty of city;
instruction.

AFFIRMED.

JOHNSON V. LEFFINGWELL *et al.*

1. **Appeal: EVIDENCE TO SUPPORT VERDICT.** A verdict will not be disturbed by this court for want of evidence to support it, where the evidence is conflicting.
2. **Mistake: OVERPAYMENT TO HUSBAND AND WIFE: WHO LIABLE.** On a sale of land by a husband and wife, there was an overpayment, by mistake, of the purchase money. If they were not joint owners of the land, it does not appear which of them owned it. The written contract of sale, and the deed which was made in consummation of it, were drawn as if both were equally, and in the same capacity and degree. owners, and the money was paid when both were present, and passed into the custody of the wife, who the next day deposited a part of it in bank and loaned a part. *Held* that these facts justified a verdict and judgment against the wife for the amount of the overpayment.

Johnson v. Leffingwell.

Appeal from Audubon District Court.—HON. A. B. THORNELL, Judge.

FILED, MARCH 9, 1888.

PLAINTIFF seeks to recover of defendants one hundred dollars alleged to have been paid to them by mistake, and twenty-five dollars damages for an alleged breach of contract to furnish certain patents to lands. Defendants deny liability, and A. J. Leffingwell asks judgment on counter-claims for \$56.41. Verdict and judgment for plaintiff and against defendant Fannie M. Leffingwell for one hundred dollars, and in favor of defendant A. J. Leffingwell and against plaintiff for \$27.50. Fannie M. Leffingwell appeals.

H. F. Andrews, for appellant.

J. L. Stotzell and Griggs & Brainard, for appellee.

ROBINSON, J.—I. October 28, 1886, the defendants entered into a written agreement with one Poyer for the sale of certain land therein described, and at the same time received one hundred dollars as part payment for the land. A few weeks later the remainder of the purchase price was paid, and at the request of Poyer a deed for the land was executed and delivered to plaintiff. Some question is raised as to whether Poyer or plaintiff was the real principal in the transactions with defendants, but, as it is not material to the determination of the case, it will not be considered.

It is claimed by the plaintiff that by mistake the entire cash consideration of the purchase, amounting to \$3,628.86, was paid when the deed was delivered, and that the one hundred dollars paid when the contract was made was not deducted, and that he is now the owner of the claim for this amount. Defendants deny these claims, and insist that only \$3,528.86 was paid at the delivery of the deed. The evidence in regard to the amount actually

1. APPEAL: evidence to support verdict.

Johnson v. Leffingwell.

paid is conflicting, and we cannot say that the verdict of the jury as to this is not sustained by the evidence.

II. Appellant insists that, although the overpayment be established, yet the evidence fails to show that

2. **MISTAKE :**
overpayment
to husband
and wife :
who liable.

appellant is liable for it. But in our opinion there is evidence sufficient to show that appellant is liable for the amount of

money actually paid at the time in controversy. It is not shown who was the owner of the land sold by defendants. Both join in all the covenants of the contract of sale and of the deed. The contract required the payment of money portions of the considerations "to said parties of the first part, A. J. Leffingwell and Fannie M. Leffingwell." The deed recites that "A. J. Leffingwell and Fannie M. Leffingwell, * * * in consideration of the sum of five thousand eight hundred and thirty-three dollars in hand paid," do sell the land described, and contains the usual covenants of title and warranty; and both grantors relinquish their "right of dower." The money was paid at the home of defendants, and appellant was there and present during at least a part of the time when the business was being done. After the money was paid it was by directions of appellant placed in a bureau drawer to which she alone carried a key. That evening the defendants together took and counted the money. The evidence seems to show that the day after the money was received she deposited a part of it in bank and loaned a part. Certainly these facts justified the jury in finding that appellant was liable for the money paid when the deed was delivered. It may be that the jury should have found that A. J. Leffingwell was also liable; but as that question is not properly before us, we do not decide it.

AFFIRMED.

THATCHER *et al.* v. THE UNION SCALE COMPANY.74 117
85 479**Sale : CONDITION : RESALE WITHOUT NOTICE : SUBSEQUENT MORTGAGE.**

A lessee of coal land purchased scales for weighing coal, and charged them to the lessors, against their account for royalty, as agreed in the lease. The scales were purchased upon an order which provided that the vendor should not relinquish title until they were fully paid for, but the lessors had no actual or constructive notice of such condition. *Held* that the charging of the scales to the lessors by the lessee, under the agreement between them, was a sale of the scales to the lessors, and that they took them free from any lien which the vendor of the scales might have had as against the lessee, and free, also, from a mortgage for the purchase money subsequently made to the vendor by an assignee of the lessee; and that it made no difference on which side the balance of the account stood as between the lessors and the lessee.

Appeal from Wayne District Court.—HON.
R. C. HENRY, Judge.

FILED, MARCH 9, 1888.

ACTION in chancery, to enjoin the sale of a railroad scale upon a chattel mortgage to defendant. After a trial on the merits, a decree was rendered granting the relief prayed for by plaintiffs. Defendant appeals.

E. S. Wishard, for appellant.

W. H. Tedford, for appellees.

BECK, J.—I. The undisputed facts of the case are these: The plaintiffs, on February 28, 1885, leased to T. A. Hill certain lands, and the right to mine coal thereon. The lease, among other conditions, provides that the lessee “shall advance the money needed to put in scales, * * * and to recover the same by withholding one-third of the gross royalty accruing until the debt is discharged.” March 5, 1885, Hill purchased of defendant the scales in controversy, upon an order in which he stipulates that defendant shall not

Thatcher v. The Union Scale Company.

relinquish its title to the scales until they are fully paid for. On the twenty-first day of the same month, the scale having been put in, Hill charged it to plaintiffs. On the sixth of October, 1885, a corporation, to whom Hill had transferred his interest in the lease and the mining property, executed to defendant a chattel mortgage upon the scales to secure the payment of the purchase money. This chattel mortgage defendant is seeking to foreclose by sale of the property. It is not shown that plaintiffs had notice of the conditions of the contract under which the scales were purchased by Hill, and it is not claimed that defendant sold the scales upon plaintiffs' credit. Plaintiffs are now in possession of the property leased and the scales. Plaintiffs testify that they did not know that the scales had not been paid for until after the mortgage had been executed. Hill, and one of the officers of the corporation succeeding to his rights, testify to the contrary. Plaintiffs claim that Hill or the corporation, or both, are owing them for the royalty on coal, provided for in the lease, which Hill and an officer of the corporation deny.

II. Counsel on both sides of the case discuss the question whether the scale became and is a part of the realty. We need not consider this question, for the reason that we think the case may be determined upon other grounds.

III. It is plain to our minds that, upon the undisputed facts of the case, plaintiffs acquired the title to the scale before the mortgage was executed. Hill, in his lease, undertakes to put it in and to receive pay for it by deducting the cost from the royalty to be paid by him. He did put in the scale and charge it to plaintiffs. This operated as a sale of the property. It does not change the result if it be conceded that plaintiffs owed Hill or the corporation. The charge to plaintiffs shows that Hill, after putting in the scale, looked to plaintiffs for pay under the conditions of the lease. He relied upon plaintiffs for payment after having put in the scale. The transaction was in fact and in law a sale and delivery of the property to plaintiffs. Defendant had no

The State v. Thompson.

lien thereon which would bind the plaintiffs. The agreement of Hill that defendant should retain the title was not known to plaintiffs, and was not binding upon them, and created no lien on the property or claim against them. Plaintiffs' ownership of the scale began when it was charged to them. The chattel mortgage was executed several months afterwards, and of course cannot defeat their right of property before acquired.

IV. Nor does the fact, if it be a fact as claimed by Hill and the corporation, that plaintiffs are indebted to them on account of the transaction connected with the coal mine, defeat his title to the property. His subsequent or prior indebtedness would not affect the sale and delivery of the scale by him as shown by the transactions we have recited.

Upon these considerations we reach the satisfactory conclusion that plaintiffs' claim and title to the scales are superior to defendant's mortgage. The decree of the district court must be

AFFIRMED.

THE STATE V. THOMPSON.

1. **Intoxicating Liquors: SALE BY PHARMACIST: NUISANCE: STATEMENTS IN APPLICATIONS NO EXCUSE.** Where a pharmacist who has a permit to sell intoxicating liquors sells such liquors to minors and drunkards, he may be convicted of maintaining a nuisance, although such sales are made upon written applications signed by the parties and stating that they are neither minors nor drunkards. (Compare *State v. Sartori*, 55 Iowa, 340.) The pharmacy act does not relieve him from the utmost rigor of the law relating to the unlawful sales of liquors.

2. **— : — : APPLICATIONS OF PURCHASERS AS EVIDENCE.** Where a pharmacist, accused of the unlawful sale of liquors to minors and drunkards, introduced in defense the applications of purchasers, *held* that he could not afterwards have stricken from the evidence all applications the signatures to which had not been identified or proved.

3. **— : — : REPORTS OF SALES AS EVIDENCE.** Also *held*, in such case, that the reports of sales made by the pharmacist, and signed and sworn to by him, were admissible as evidence against him, without proof of his signature.

74	119
90	152
190	159
74	119
95	405
74	119
104	531
74	119
108	163
74	119
110	627
110	628
74	119
111	39
74	119
133	631

The State v. Thompson.

4. ——— : ——— : BURDEN OF PROOF AS TO LAWFULNESS OF SALES. A pharmacist is bound to know whether the persons to whom he sells liquors are such as he may lawfully sell to (*Dudley v. Sautbine*, 49 Iowa, 650); and the burden is on him to show that his sales are lawful. (Compare *State v. Cloughly*, 73 Iowa, 626.)
5. **Criminal Practice : SEALED VERDICT : JURORS ABSENT.** Where on a trial for misdemeanor the parties agree to a sealed verdict, and when such verdict is received the defendant makes no objection that some of the jurors are absent, and does not demand that the jury be polled, he waives the error, if any, in receiving the verdict in the absence of some of the jurors.

Appeal from Benton District Court.—HON.
L. G. KINNE, Judge.

FILED, MARCH 9, 1888.

DEFENDANT was indicted and convicted of the offense of maintaining a nuisance by keeping a building, called a drug-store, for the sale of intoxicating liquors in violation of the statutes. He now appeals to this court.

J. J. Mosnat and Geo. C. Scrimgeour, for appellant.

A. J. Baker, Attorney General, for the State.

BECK, J.—I. The evidence shows that defendant was a registered pharmacist, and made many sales of intoxicating liquors, upon applications admitted in evidence, signed by the purchasers, and delivered to him, all of which are in the form and language of the following, except as to names and quantities:

1. INTOXICATING
liquors: sales
by pharmacist:
nuisance:
statements in
applications
no excuse.

“Belle Plaine, Iowa, September 6, 1886.

“To Dr. W. W. Thompson, Reg. Ph. No.
2,223,

“I am over 21 years of age, and not in
the habit of becoming intoxicated, and
hereby apply for:

Amount:

1-2 Pt.

Kind of Liquor:

Whiskey.

Which is to be used “only for the actual
necessities of medicine.

“T. H. MILNER, Purchaser.”

Original.

Dispensed by Dr.
Thompson, Reg.
Ph. No. 2,223.

The State v. Thompson.

It is satisfactorily shown that one of the sales, at least was to a minor, and others to persons in the habit of becoming intoxicated.

II. Counsel for defendant insist that the court erred in admitting evidence showing the habits of intoxication or the minority of the purchasers. Their position seems to be that, as defendant held a permit to sell intoxicating liquors, and it was sold upon the applications, one of which we have just set out, no intent to sell unlawfully was shown, and, therefore, the sale to inebriates or minors was not in violation of the law. But defendant may be convicted of maintaining a nuisance by keeping a place with intent unlawfully to sell therein intoxicating liquors (Code, secs. 1543, 1544); and the unlawful intent may be presumed from the unlawful sales. *State v. Sartori*, 55 Iowa, 340. Were the rule otherwise, the very subterfuge of written applications of purchasers would enable pharmacists to violate the law without fear of punishment.

III. Counsel argue that under the pharmacy statute defendant could not have "abused the trust" for the sale of intoxicating liquors confided to him, unless he had knowledge of the habits of intoxication or of the minority of the purchasers. But that statute does not relieve the defendant of the "utmost rigor of the law" prohibiting unlawful sales. If the sales are for unlawful purposes, he has no protection from the pharmacy statute, which hands him over to be dealt with under other statutes according to their "utmost rigor." See *State v. Ward*, 36 N. W. Rep. 765.* The question of the guilt of a pharmacist is to be determined under the statutes he violates, according to the rules applicable to other offenders.

IV. It is insisted that the court erred in refusing to strike from the evidence all the applications for purchases the signatures whereof had not been identified or proved. These papers were documents procured by defendant,

2. —: —: applications of purchasers as evidence.

* [The opinion in this case is reserved on petition for rehearing, and hence it is not yet officially reported.—REPORTER.]

The State v. Thompson.

upon which he attempted to justify his acts of selling; he surely cannot dispute them. They constitute evidence which he attempted to make for himself; he cannot dispute it. Whether the signatures are true or false, the applications were properly in evidence to show the facts upon which defendant bases his defense that the sales were lawfully made.

V. It is insisted also that the reports of defendant of the sales made by him, and his affidavits verifying them, ought not to have been admitted in evidence, for the reason that his signatures thereto were not proved. But, as these papers were filed by him in discharge of a duty imposed by law, they will be received in evidence as public records. Their character as public records requires that they be received without further proof. The defendant's name appears therein, and his signature is attached thereto. He is thus shown to be the identical man that executed them. When a paper executed by a party is introduced in evidence in a case,—civil or criminal,—he is identified by his name,—the only manner of identification required by the law. Of course, defendant could have shown, if such were the facts, that while his name is the same as that affixed to the documents, he is really not the same man. But no such thing was even suggested.

VI. The defendant, as we have seen, when on trial for the unlawful sales of intoxicating liquors to inebriates or minors, cannot excuse himself on the ground of his ignorance of the fact that the persons to whom he sold were minors or inebriates. He was bound to know whether they were persons to whom he could sell lawfully. See *Dudley v. Sautbine*, 49 Iowa, 650, and cases therein cited. And the burden rested upon him to show that the sales were lawful. *State v. Cloughly*, 73 Iowa, 626. Instructions given to the jury complained of by defendant are in harmony with these views.

VII. The abstract shows that, after the cause had been submitted to the jury, they were authorized, by

Grimes v. The City of Burlington.

5. CRIMINAL
practice:
sealed ver-
dict: jurors
absent.

consent of defendant and the state's attorney,
to return a sealed verdict, which was
afterwards done, and that all the jury were
not present when the verdict was received.

It is not shown that defendant demanded that the jury be polled, or objected when the verdict was filed, on the ground that all of them were not present. Counsel for the defendant now insist that the court below erred in overruling a motion for a new trial based upon the ground of the absence of the jury when the verdict was rendered. The practice, we think, generally prevails in this state to permit juries, in cases for misdemeanors, to return sealed verdicts upon consent of the defendant and the state. We think when such a verdict is delivered to the court, and opened when all the jury are not present, and no demand is made for the presence of all, or that the jury be polled, nor objections are made to the absence of the jurors, and no prejudice to defendant is shown, none will be presumed. Therefore, if it be conceded that there was error in receiving the verdict in the absence of the jurors, it was without prejudice, and is not the ground for reversal. By failing to object to the absence of the jurors, the defendant waived the error, and by failing to ask that the jury be polled, he cannot urge that he was deprived of any right, or that he sustained prejudice by reason of the absence of the jurors.

These views dispose of all questions in the case. We reach the conclusion that the judgment of the district court ought to be

AFFIRMED.

GRIMES V. THE CITY OF BURLINGTON.

Taxation : APPEAL FROM BOARD OF EQUALIZATION : EVIDENCE. On an appeal from an order of the board of equalization increasing the assessment of a taxpayer, the appellate court tries the case anew upon the evidence introduced in that court, and not alone upon the record of the board of equalization : the object of an appeal, according to the true meaning of the word, being to secure a new trial upon the merits.

74	123
97	505
74	123
102	3
74	123
L114	108
74	123
126	264
74	123
136	208

Grimes v. The City of Burlington.

Appeal from Des Moines Circuit Court. — HON.
CHARLES H. PHELPS, Judge.

FILED, MARCH 9, 1888.

THIS is a proceeding instituted by plaintiff, to correct the assessment made upon his personal property for taxation. There was a decision upon an appeal to the circuit court adverse to him. He now appeals to this court.

P. Henry Smyth & Son, for appellant.

John J. Seerley, for appellee.

BECK, J.—I. The city council of the city of Burlington, wherein plaintiff resided and was a taxpayer, acting under the statute as a board for the equalization of taxes, added to plaintiff's assessment ten thousand dollars upon moneys and credits alleged to be held by him, and which the assessor failed to assess. There was no evidence introduced before the board of equalization other than the assessment, and an affidavit of plaintiff denying that he was subject to assessment for moneys and credits. These papers were before the board, and we presume they were regarded as in evidence. The plaintiff, as authorized by statute (Code, sec. 831), appealed to the circuit court. Upon the trial in the circuit court the defendant offered to introduce evidence to show that plaintiff was subject to assessment upon ten thousand dollars of money and credits, to which plaintiff objected, insisting that no evidence could be admitted on the appeal, and that it must be tried upon the record of the proceedings of the board of equalization. The objection was overruled, and the court held that the evidence was admissible. After this ruling the plaintiff, in the language of the abstract, "to save time and delay, conceded that he had property at the time sufficient to justify the assessment." Thereupon the circuit court affirmed the action of the board of equalization.

II. The sole question presented by the record

Grimes v. The City of Burlington.

before us is this: Upon an appeal from the action of the board of equalization, is the case to be decided upon the record of its proceedings alone, or may evidence be introduced by the parties in addition to the matters shown by such record? The statute authorizing the appeal from the board of equalization does not prescribe the proceedings or manner of the trial of the appeal. It simply declares that the assessment shall be corrected "in such manner as to said board may seem just and equitable." Upon the appeal the case must be tried upon facts presented to the court. The case may be determined by the board of equalization wholly upon facts known to its members. *Smith v. Supervisors of Jones County*, 30 Iowa, 531. In that case the circuit court would have before it no record at all upon which to adjudicate the question involved. But the statute, in authorizing the appeal, provides that the question of the liability to assessment shall be justly and equitably determined upon the facts of the case. It provides for a review by which the action of the board of equalization may be corrected. Such trial, in order that this end may be attained, must be had upon evidence which will disclose fully the facts of the case, whether the same be in the record or first introduced upon the appeal. The administration of justice to the taxpayer demands it.

III. Counsel for plaintiff insists that the appeal brings before the circuit court only the evidence or facts found in the record of the board of equalization. This conclusion is based upon the mistaken position that in the use of the word "appeal" the statute indicates that the trial shall be had in that manner, for the reason that the word bears that meaning. In truth, its meaning is directly to the contrary. The "object of an appeal is to review the whole case and secure a just judgment on the merits." "It is examined and tried as if it never had been tried before." See Bouv. Law Dict. Counsel's views of an appeal express correctly the proceedings and trial upon a writ of error. While an appeal is authorized by statute, unless otherwise restricted, the proceeding in all cases is anew, in order

Grimes v. The City of Burlington.

to determine the very merits of the matters in dispute. Such is the manner of trial in many appeals authorized by the statutes of this state, as in *ad quod damnum* proceedings in the assessment of damages for public highways, and other proceedings which need not be here mentioned. Appeals to this court are for the correction of errors in cases at law, and for trials *de novo* in cases in chancery. But under the constitution and statutes of this state chancery cases must be tried here upon the record of the evidence sent from the court below. *McGregor v. Gardner*, 16 Iowa, 538. Counsel's position receives no support from the provisions of the statutes.

IV. Upon the appeal the circuit court becomes the assessing tribunal, which is clothed with authority to determine anew the sum in which the taxpayer is to be assessed. By the appeal the assessment and equalization are set aside or suspended, and the assessment is again made by the judgment of the circuit court. To the end that the questions involved may be determined in accord with the demands of the law and justice, that court is required to hear the matter anew upon all evidence tending to direct to a just decision. This has been the practice in cases of this character upon the trial of appeals from boards of equalization. *Bremer County Bank v. Bremer County*, 42 Iowa, 394; *Ingersoll v. City of Des Moines*, 46 Iowa, 553; *Ger. Am. Sav. Bank v. City of Burlington*, 54 Iowa, 609; *Dunleith & D. Bridge Co. v. Dubuque County*, 55 Iowa, 558; *Hutchinson v. Board of Equalization*, 66 Iowa, 35.

We reach the conclusion that the judgment of the circuit court ought to be

AFFIRMED.

PLATT & SPEITH v. THE CHICAGO, BURLINGTON &
QUINCY RAILWAY COMPANY.

74	127
86	356
74	127
136	178

1. **Nuisance : ON PUBLIC GROUND : FACTS CONSTITUTING.** The city of Des Moines, by ordinance, leased to defendant, for "railway depot purposes", a portion of ground lying within the city and dedicated to the general public, reserving, however, the "right of way to and over the bridge at the mouth of Coon river; also the right to use so much of said grounds as may be necessary to use in the repair of the same, or for rebuilding a bridge, in case the necessity of the same should ever arise. The city also reserves the right to provide by resolution for the necessary repair and good condition of the road leading to said bridge, and to provide that the same shall be kept in good repair and condition by said railroad company for public travel." The defendant built a round-house and turn-table on the ground (which structures were not within the terms of the lease) in such a way as to interfere with the customary travel over said ground to plaintiffs' place of business. *Held* that it was the intent of the city, as expressed in the ordinance, that the defendant and the general public should jointly use and occupy the grounds for highway purposes, and that the round-house and turn-table constituted a nuisance for which plaintiffs were entitled to damages, and which the court properly ordered to be removed.
2. **Ordinance : CONSTRUCTION : DUTY OF COURT.** It is the duty of the court, and not of the jury, to construe an ordinance the meaning of which is involved in a pending suit.
3. **Nuisance : PUBLIC : PRIVATE ACTION.** A nuisance may be both public and private, and, if an individual suffers special damages thereby, he may maintain an action therefor. (Compare *Park v. C. & S. W. Ry. Co.*, 43 Iowa, 636.)
4. **— : DAMAGES : ORDER FOR REMOVAL.** The court, in an action for nuisance, rendered judgment on the verdict for damages, and on motion ordered the nuisance abated. Although the verdict did not necessarily determine the continued existence of the obstruction, it was conceded on the trial. *Held* that the order of removal was not erroneous. (Compare *Miller v. Keokuk & Des M. Ry. Co.*, 68 Iowa, 680.)

Appeal from Polk Circuit Court.

FILED, MARCH 9, 1888.

THE plaintiffs are the owners of certain lots fronting on Water or Front street, in the city of Des Moines, on which is situated a building used by them for business purposes, and claim that they have been injured and have sustained great damages by the wrongful acts of the defendant in constructing an engine-house, turn-table and railroad tracks upon public ground, over which travel from the south reached plaintiffs' place of business. Plaintiffs claim that the obstruction is a nuisance, and the relief asked is that the same be abated, and judgment rendered for the damages sustained. The defendant denied the allegations of the petition, and pleaded that it was in the possession of the premises, and constructed thereon the alleged obstructions, under an ordinance of the city of Des Moines. Trial by jury, verdict for plaintiffs, and judgment, and an order was entered requiring the defendant to remove the obstructions. The defendant appeals.

Runnells & Walker, for appellant.

Phillips & Day, for appellees.

SEEVERS, C. J.—In 1846, the county commissioners of Polk county duly laid out the town of Fort Des Moines, now the city of Des Moines, and caused to be recorded a plat thereof, upon which there is a parcel of land designated as “public grounds”, and the same was dedicated to the general public. The plat was duly acknowledged and recorded, and the streets and public grounds were declared to be public highways. Such grounds were bounded on the “north by block 37; west by a line parallel with the east side of block 28 (in said town), extending to the Raccoon river; and east by the Des Moines river.” No streets were laid off across said grounds, but persons crossing Coon river, over which a bridge was erected, passed over said grounds in such direction as they pleased for many years; and such persons, and all travelers on business or pleasure, could readily pass from said bridge across the grounds to

 Platt & Speith v. The Chicago, B. & Q. Ry. Co.

Front or Water street, and thus reach the plaintiffs' place of business, until 1879 or 1880, when the obstructions of which the plaintiffs complain were constructed by the defendant. The city of Des Moines, by an ordinance duly passed, leased said public grounds for ninety-nine years to the Des Moines & Knoxville Railroad Company for "railway depot purposes"; reserving, however, the "right of way to and over the bridge at the mouth of the Coon river; also the right to use so much of said grounds as may be necessary to use in the repair of the same, or for rebuilding a bridge, in case the necessity for the same should ever arise. The city also reserves the right to provide by resolution for the necessary repair and good condition of the road leading to said bridge, and to provide that the same shall be kept in good repair and condition by said railroad company for public travel." The defendant, as the successor of the Knoxville Company, constructed a railway, consisting of several tracks, and a round-house and turn-table on said grounds. It was admitted on the trial that "Front street, upon which plaintiffs' property is situated, would, if extended, have passed between the round-house and turn-table, but that the passage of wagons was rendered practically impossible, and that no travel, as a matter of fact, passed that way; and, further, that people coming from the south across the Coon river bridge, who should desire to go to plaintiffs' property, would be compelled to travel a circuitous way in order to reach it."

I. This cause was submitted and determined at a former term, but, because we failed to consider a question material to the determination of the case, a rehearing was granted. Such question is whether the city had the power to confer, and whether it in fact did confer, upon the defendant the right to erect upon said grounds the round-house and turn-table. For the purposes of this opinion, it will be conceded that the city had the power to lease the grounds to defendant's grantor for railway

1. NUISANCE : on public ground: facts constituting.

Platt & Speith v. The Chicago, B. & Q. Ry. Co.

“depot purposes.” This necessarily would include the right to construct a depot and tracks to reach and make the depot available for the transaction of business. The grounds were dedicated to the public for highway purposes, but in what manner it should be used by the public was not expressly declared. In such case, the use “varies according to circumstances, to be judged by the proper local authorities or corporate guardian, subject to the control of the laws and the courts.” But in no event can ground so dedicated be devoted to private purposes. 2 Dill. Mun. Corp., sec. 645. For the purposes of this opinion, it will be conceded that a railway is a public highway, and that it was competent by ordinance for the city to lease public grounds for the construction of a railway to and across the same, and construct a depot thereon. More than this the city did not do. On the contrary, the reservations made in the ordinance clearly indicate the intent of the city, which was that the defendant and the general public should jointly use and occupy the grounds for highway purposes. It clearly appears, we think, that the railway tracks do not materially obstruct the passage of the general public across the grounds; but, from the concession made on the trial, it clearly appears that the round-house and turn-table seriously interfered with the passage of persons and teams across such grounds. Now, the city did not authorize and empower the defendant to construct such house and appliance. The most liberal view that may be taken of the ordinance will not authorize such a construction. They, therefore, have been constructed upon public grounds dedicated to highway purposes, without any right to do so, and, therefore, must be regarded as nuisances, in so far as the general public is concerned. It follows that the second instruction given by the court to the jury, which simply affirms the right of the public to an unobstructed passage over the grounds, is correct. It may, however, be said that the city reserved but a single highway across the grounds, and, as it has constructed a sidewalk from the end of the bridge in a northeasterly direction

 Platt & Speith v. The Chicago, B. & Q. Ry. Co.

over the same to the south end of Second street, that it has thereby directed or indicated that travel should pass that way. By taking that way, persons could, by a circuitous route, reach the plaintiffs' place of business. It is by no means certain that the ordinance and reservations should be so construed; for a right of way across the grounds was clearly reserved. This should be construed as a reservation to the public of the right to cross the grounds; not, possibly, in the precise manner enjoyed at the time the ordinance was passed, but so that such right should substantially continue to exist. The construction of the sidewalk simply amounts to an invitation to foot-travelers to pass that way. It will be observed that the city reserved the right to provide by resolution that "the road" leading to the bridge should be kept in good repair by the defendant. The fact that the city has not passed such a resolution is immaterial. The right to do so exists, and indicates quite clearly, we think, that it was not contemplated by the ordinance that the general public should be deprived of the right to cross the grounds in substantially the same manner as was enjoyed at the time the ordinance was passed.

II. From what has been said, it sufficiently appears that the sixth instruction asked by the defendant was

2. ORDINANCE: properly refused; and this is true as to the
 construction:
 duty of court. seventh, because thereby the jury were required to construe the ordinance, when it is obvious that this was the province of the court. It is urged by counsel for the defendant that, conceding the existence of the nuisance as claimed, it was of a public character; and, therefore, a right of action to the plaintiff to recover damages caused thereby, or to abate it, does not

3. NUISANCE: exist. The rule upon this subject is that a
 public: pri-
 vate action. nuisance may be both public and private, and, if an individual suffers special damages thereby, he may maintain an action therefor. *Park v. C. & S. W. Ry. Co.*, 43 Iowa, 636. There was sufficient evidence in this case that the plaintiffs had suffered such damages to justify the jury in so finding.

Ball v. The Keokuk & N. W. Ry. Co.

III. The jury found for the plaintiffs, and assessed the damages, and, upon motion, the court ordered the obstructions to be removed. It is urged that the verdict does not necessarily determine that the nuisance existed at the time it was rendered; but no such claim was made on the trial. The existence of the obstructions was a conceded fact. The evidence, without the slightest contradiction, so shows; and, therefore, the order directing the removal of the obstructions and abatement of the nuisance is correct. Code, sec. 3331; *Miller v. Keokuk & Des M. Ry. Co.*, 63 Iowa, 680.

The judgment of the court is **AFFIRMED**,

BALL V. THE KEOKUK & NORTHWESTERN RAILWAY COMPANY.

1. **Practice : IMPROPER STATEMENT TO JURY : AMOUNT OF VERDICT OF FORMER JURY.** On an appeal from the award of a right-of-way jury, it is improper for counsel for plaintiff, in stating the case to the jury, to refer to the amount of the award appealed from, but such impropriety is no ground for discharging the jury on defendant's motion. It is sufficient for the court at the time, and in the final instructions, to advise the jury that their verdict should in no way be influenced by the amount of such award.
2. **Railroads : RIGHT OF WAY : EVIDENCE AS TO DAMAGES.** In an action for damages to a farm, caused by taking the right of way for a railroad, witnesses were permitted to give their estimate of the value of the farm before the road was built, and then to state that it was worth a certain number of dollars less per acre after the road was built. *Held* not prejudicial error, since each of the witnesses afterwards stated that the farm was worth a certain sum per acre after the road was built.
3. **— : — : DAMAGES : COMPETENCY OF WITNESSES.** In such case the testimony of farmers, who lived in the neighborhood of the farm in question, and who stated that they knew the value of lands there, was competent on the question of damages.
4. **Evidence : OBJECTIONS TO—NOT TO WITNESSES.** The objection of "incompetent, irrelevant and immaterial," to offered testimony, without more, goes to the testimony alone, and not to the competency of the witnesses. (Compare *White v. Smith*, 54 Iowa, 283).

74	132
91	482

74	132
102	56

74	132
106	130

74	132
107	229
107	230

74	132
1139	237

Ball v. The Keokuk & N. W. Ry. Co.

5. **Railroads: RIGHT OF WAY: DAMAGES: SET-OFF: INSTRUCTIONS.** In an action against a railway company for right-of-way damages, it is proper for the court to instruct as to the constitutional provision that no benefits to the plaintiff are to be set off against his damages, even though no claim is made for such set-off on the trial.
6. ——— : ——— : ——— : **ALLOWANCE NOT EXCESSIVE.** Considering the varying estimates of the witnesses, and other facts in the case (see opinion), a verdict of thirty-six hundred and forty-eight dollars for eleven acres of land taken for right of way for a railroad, cannot be regarded as so excessive as to justify interference by this court.

Appeal from Lee District Court.—HON. J. M. CASEY,
Judge.

FILED, MARCH 9, 1888.

THE plaintiff is the owner of a farm of two hundred and twenty acres. The defendant constructed a railroad over said farm several years ago. The plaintiff instituted proceedings to have his damages assessed under the statute. A commission or sheriff's jury was impaneled, and the damages were fixed at three thousand dollars. The defendant appealed from the assessment, and a jury trial was had in the court below, which resulted in a verdict of thirty-two hundred and fifty-nine dollars for the plaintiff. A new trial was awarded by this court, and another jury trial was had, and a verdict for thirty-six hundred and forty-eight dollars was returned for the plaintiff. The defendant appeals.

James H. Anderson and H. H. Trimble, for appellant.

D. N. Sprague and Frank Hagerman, for appellee.

ROTHROCK, J.—I. The cause was reversed upon the first appeal because the evidence did not identify the different tracts of land composing the farm. We are now advised that the land claimed to be damaged by the railroad consists of an entire farm of two hundred and twenty acres, made up of several contiguous government

1. PRACTICE:
improper
statement to
jury: amount
of verdict of
former jury.

 Ball v. The Keokuk & N. W. Ry. Co.

subdivisions. The defendant's first complaint is that one of the plaintiff's counsel, in his opening statement to the jury, in giving a history of the case, stated that the sheriff's jury fixed the damages to the farm at three thousand dollars, and that thereupon counsel for the defendant, claiming that such statement was misconduct on the part of counsel, moved the court to discharge the jury. The motion was overruled. What occurred in reference to the matter does not appear to have been made of record except by a statement taken down by the short-hand reporter. It is doubtful if this statement was made a part of the bill of exceptions. If it were properly of record, we do not think the cause should be reversed for a refusal to discharge the jury. While a delicate sense of propriety ought probably to deter counsel from stating to a jury the result of a former trial of the case, we are not prepared to say that it is such misconduct as to demand anything more from the court than an admonition to the jury that a knowledge of the amount of a former verdict should have no influence upon them. This was done by the court at the time, and afterwards in the instructions given at the close of the trial.

II. It is urged that the court erred in admitting incompetent and improper testimony by two of plaintiff's witnesses, named Ball and Watson. It appears from appellant's abstract that these witnesses were permitted to give their estimate of the value of the farm before the road was built, and then to state that it was worth a certain number of dollars less per acre after the road was constructed. Whatever may be thought of this method of examining a witness, it appears that it could not have been prejudicial to the defendant, for the reason that both of the witnesses afterwards stated that the farm was worth a certain sum per acre after the railroad was built. This appears from an additional abstract filed by the appellee. This abstract is claimed by counsel for appellant to have been unnecessary and immaterial. But it is not denied. We make this reference to it

2. RAILROADS:
right of way:
evidence as to
damages.

Ball v. The Keokuk & N. W. Ry. Co.

now, so that it will be understood that when we refer to the record we mean the record as amended by appellee's abstract.

III. We come now to consider objections made to the testimony of a large number of the plaintiff's

3. — : — : witnesses upon the question as to the damages to the farm by reason of the construction of the road. The uniform objection to all of the questions asked these witnesses as to the value of the farm before and after the road was built was that the question was "incompetent, irrelevant and immaterial." It is now insisted that the witnesses were not shown to be competent to give an opinion as to the value of the land. The record shows that each of the witnesses was a farmer, living in the neighborhood of the farm in question, and that he knew the value of lands. We believe it is the usual practice to take the testimony of a witness upon a question of value, when he states under oath that he knows

the value of the property in question, or that he knows the value of like property. A cross-examination may very much impair his testimony, but it is not for that reason to be taken from the jury. Moreover, the objection of "incompetent, irrelevant and immaterial," to offered testimony, without more, goes to the testimony, and not to the competency of the witness. *White v. Smith*, 54 Iowa, 233.

4. EVIDENCE: objections to—not to witnesses. A cross-examination may very much impair his testimony, but it is not for that reason to be taken from the jury. Moreover, the objection of "incompetent, irrelevant and immaterial," to offered testimony, without more, goes to the testimony, and not to the competency of the witness. *White v. Smith*, 54 Iowa, 233.

IV. It is contended that the court erred in refusing to give the fifth instruction to the jury, asked by the defendant; and in giving the sixth

5. RAILROADS: right of way: damages: set-off: instructions. instruction of the charge. The specific objection to the sixth instruction is that the jury are therein advised that it was not proper to set off benefits to the plaintiff, if any, on account of the improvement for which the land was taken. It is said there was no claim made to set off any of the damages by benefits to the plaintiff, and that the instruction was, therefore, erroneous. We think it was perfectly proper for the court to state

 Ball v. The Keokuk & N. W. Ry. Co.

the law governing damages of this kind, as found in the constitution and statutes of the state, no matter what evidence had been introduced. We doubt if a case of this kind has ever been submitted to a jury in this state, without a direction as to the constitutional provision referred to in this instruction. As to the refusal to give to the jury instruction number five, asked by defendant, we deem it sufficient to say that, taking the instructions given by the court upon the measure of damages, to which the defendant's instruction number five applies, we discover no error in the ruling complained of. It appears to us that the court's charge to the jury is a very clear and fair statement of the law governing the rights of the parties, and that no more was required for the protection of the rights of either party.

V. It is claimed that the verdict is grossly excessive in amount. As is usual in such cases, there is a wide difference in the estimates of value given by the witnesses. Some of those examined in behalf of the plaintiff place the damages at a much larger amount than the verdict. Some of the defendant's witnesses place the damages at what they regard the value of the land actually taken for the right of way, and a merely nominal sum in addition. A large number of the witnesses, in their estimates, range all the way between these extremes. The farm appears to be quite valuable. The railroad runs angling through it, and takes eleven acres for the right of way. The road was constructed in 1880, and the plaintiff was entitled to interest on the damages from that time to the time of the trial. Taking all these facts into consideration, we are content to let the verdict stand undisturbed.

VI. Lastly, it is claimed the court erred in entering what is denominated a decree against the defendant. An examination of the record entry, as found in appellee's additional abstract, shows it to be in accord with the provisions of section 1257 of the Code, which fixes the order to be made in such cases.

AFFIRMED.

Kuhn v. The Chicago, M. & St. P. Ry. Co.

KUHN V. THE CHICAGO, MILWAUKEE & ST. PAUL
RAILROAD COMPANY.74 137
90 330

Railroads : EJECTION OF PASSENGER : DAMAGES : EXEMPLARY WITH OUT ACTUAL. Plaintiff sued for damages to his health, through exposure, in being wrongfully ejected from defendant's train before he had reached the destination to which he had paid his fare. The court instructed the jury that he was not entitled to any damages, under the evidence, unless it was for the value of transportation from where he was ejected to his destination, and that, if they found him entitled to any damages on that ground, they might also give him exemplary damages in case they found that he had been ejected maliciously. But no damages for such transportation were claimed or proved by plaintiff, and it appeared that the fare to the two points was the same. *Held* that the instruction was erroneous in submitting a point that was not in issue, and that as, under the instruction, no other actual damages could lawfully be found, it was error to authorize the jury to find exemplary damages, since such damages can never be allowed in the absence of actual damages. (See cases cited in opinion.)

Appeal from Carroll District Court.

FILED, MARCH 9, 1888.

THIS is an action at law by which the plaintiff seeks to recover damages of the defendant upon the ground that a conductor on one of its trains, upon which plaintiff was a passenger, wrongfully, maliciously and forcibly ejected the plaintiff from said train. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

Wright, Baldwin & Haldane, for appellant.*Scott & Scott*, for appellee.

ROTHROCK, J.—The plaintiff and one King were at Coon Rapids on the line of defendant's railroad on the thirteenth day of February, 1883. They desired to travel on the road to Manning, a station some distance

Kuhn v. The Chicago, M. & St. P. Ry. Co.

west of Coon Rapids. They made application to the ticket-agent at Coon Rapids for tickets to Manning. The agent sold them tickets to another station called Warwick, which is a short distance east of Manning, and stated to them that the tickets were good for passage to Manning. The fact that the tickets were good for passage to Manning is conceded by the defendant, and plaintiff claims that he told the conductor when he took up his ticket that he wanted to go to Manning. The train arrived at Warwick after dark. The plaintiff claims, and he and King testified on the trial, that, as the train approached Warwick, the conductor called the name of the station, and commanded the plaintiff and King to leave the train ; that they refused and tried to explain, and claimed that their tickets were good to Manning ; but that the conductor, with loud and profane language, stated to them if they did not leave the train he would put them off, and advanced towards them in a threatening manner as if to execute his threat ; whereupon they left the train. It is claimed that there was a deep snow and no traveled road between Warwick and Manning, and no house at Warwick where plaintiff could stay ; that he was compelled to travel through the snow and water to Manning in a rain, by which exposure he caught a severe cold, and was sick for a week. The person who was conductor of the train was sworn as a witness, and in his testimony he stated that he knew the tickets were good for passage to Manning, and that he stated to the plaintiff that, as Warwick was but a flag station, he had better leave the train at Manning, but that plaintiff and his companion demanded their right to be allowed to leave the train at Warwick ; and that he accordingly stopped at that station, where they got off, without objection or protest ; and that he used no profane, loud or boisterous language towards them whatever.

It will be seen from the foregoing statement that the evidence was sufficient to authorize the jury to find that the plaintiff was wrongfully compelled to leave the train before the contract of carriage was completed, and that he was entitled to damages in some amount. The

Kuhn v. The Chicago, M. & St. P. Ry. Co.

court instructed the jury, on the question of damages, as follows :

“There is no evidence from which any assessment of actual damages can be made in this case, beyond the value of the transportation from Warwick to Manning, which would be but a few cents, so that upon this point there is no room practically for the assessment of any actual damages beyond the value of the transportation between those two points. The most important question on this point is whether or not anything ought to be added by way of exemplary damages. If you conclude, from the evidence, that the plaintiff was wrongfully compelled to leave the train at Warwick, and it is further shown that the conductor acted maliciously in so wrongfully compelling him to leave it there, exemplary damages may be awarded as a punishment for the wrongful act. If it is shown that the conductor, in ordering plaintiff to leave the train at Warwick, if he did so, was actuated by a desire to injure, harass or annoy the plaintiff ; or if his acts and manner of conduct and language were such as indicated a wanton recklessness of the rights of the plaintiff, or were unreasonably abusive and humiliating to the plaintiff, exemplary damages may be awarded. But if the evidence shows that plaintiff, or he and his companion, refused or neglected to inform the conductor, when asked, at which station he desired to stop, and by their conduct led the conductor to stop the train at Warwick on purpose to allow him to get off there, or if plaintiff's conduct was such as to invite any altercation or angry words, the plaintiff will not be entitled to any exemplary damages. No exemplary damages can be awarded unless a cause of action and some actual damages, as before explained, are first shown, and even then you are not bound to add anything for exemplary damages, although you may do so, if it is shown that the act of the conductor was malicious or wanton, as before stated ; and the amount thereof, if any are assessed, is of necessity left to your sound discretion, and should be assessed, if at all, in view of all the circumstances in this particular case.”

Kuhn v. The Chicago, M. & St. P. Ry. Co.

The defendant claims that the first paragraph of this part of the charge is erroneous, because the plaintiff made no such claim in his petition, and there was no evidence in the case from which the jury could estimate the actual damages to which the court limited the recovery. The instruction states that it would be but a few cents. There was no direct evidence of the cost of a ticket from Warwick to Manning, and, indeed, there is no evidence that tickets were sold from one station to the other. The distance between the two stations is one mile and a quarter, as shown by the evidence. It may be that the jury could have made an estimate of the fare for that distance. But the evidence shows, without conflict, that the cost of a ticket from Coon Rapids to Manning was the same as it was to Warwick, and the plaintiff made no claim in his petition to recover the fare he had paid for the distance the defendant failed to carry him. It is manifest that the court intended to instruct the jury that the actual damage was merely nominal. It was the duty of the jury to obey that instruction. They could not lawfully find that the plaintiff was entitled to actual damages for the exposure and inconvenience in wading through snow and water in a rain, and the consequent sickness; and, as the plaintiff did not except to the instruction, and appeal, we are required to treat it as the law of the case, in so far as it practically excluded all but nominal damages, whatever the true rule of law upon the proven facts may be. It must not be understood that we hold that, because under the instruction the plaintiff was practically held to be entitled to only nominal damages, he could not recover in any amount. Whenever there is an invasion of a legal right, the law infers some damage to the plaintiff, and when no amount is proved, the recovery is nominal, being some very small sum. In the view taken of the plaintiff's right of recovery, the court was not warranted, either from the issues or evidence, to direct the jury to find for the plaintiff in the amount of his unearned passage money; and, as every other element of actual damage was eliminated from the

The State v. Dow.

case, the conclusion must be that the jury were only warranted in considering nominal damages, in determining the question of actual compensation for the injury.

II. In view of what has been said of the paragraph of the charge we have been considering, that part of the instruction which authorizes the jury to award exemplary damages cannot be sustained. It is well settled that, where the damage to the plaintiff is merely nominal, that is, where a right is invaded, and there is no evidence of actual damage, there is no foundation upon which exemplary damages can attach or rest. *Stacy v. Portland Publishing Co.*, 68 Me. 279; *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Ganssly v. Perkins*, 30 Mich. 492; *Maxwell v. Kennedy*, 50 Wis. 645. The court having practically taken away from the jury all evidence of actual damages, it was error to authorize them to enter into consideration of the question of exemplary damages.

REVERSED.

THE STATE V. DOW.

Criminal Law : ELECTION BY STATE TO RELY ON DIFFERENT ACTS ON SUCCESSIVE TRIALS. Where upon prior trials the state has elected to rely for conviction on one of two or more acts which the evidence tended to prove, it may, on a subsequent trial,—the verdicts of conviction having been set aside and new trials awarded,—elect to rely for conviction upon evidence tending to prove another act different from the act found by the prior verdicts; and this is not permitting the state to prove an offense other than that for which the defendant was before tried, but only to prove the same offense by other evidence. So *held*, in a prosecution for the unlawful sale of intoxicating liquors, where the evidence tended to prove several sales, each of which would have supported a verdict of guilty, and the state, on the last trial, elected to rely on the evidence establishing a sale different from the one relied on in the former trials.

The State v. Dow.

Appeal from Mahaska District Court.—HON. D. RYAN, Judge.

FILED, MARCH 10, 1888.

DEFENDANT was convicted of the crime of selling intoxicating liquors contrary to the statute, and he now appeals to this court.

John F. Lacey and Bolton & McCoy, for appellant.

A. J. Baker, Attorney General, for the State.

BECK, J.—I. The prosecution was commenced upon an information before a justice of the peace, where defendant was convicted. Upon an appeal to the district court, a verdict of guilty was rendered, which was set aside, and a new trial was granted. A second verdict of guilty was also set aside, and another trial had, which resulted in a third verdict of guilty. Before or pending the last trial in the district court, the defendant amended his plea, setting up that he had been acquitted at the prior trial by the act of the court, in withdrawing from the jury the consideration of certain evidence which tended to show an offense other than the one for which he was convicted, and that he was, therefore, put upon trial for another and different offense than the one to which the law required him to answer. At the last trial the evidence tended to show two direct unlawful sales. The state was required to elect the sale for which it would ask conviction, and, having done so, the court directed the jury not to consider the evidence tending to show the other sale; that evidence having been withdrawn from the jury. The sale upon which the state relied for conviction at the last trial was not the one for which conviction was had at the former trials, but another. The question for our decision is this: Where upon prior trials the state elected to rely for conviction upon one of two or more acts, which the evidence tended to prove, may the state, in a subsequent trial,—the verdicts of conviction having been set aside and new

The State v. Dow.

trials awarded,—elect to rely for conviction upon evidence tending to prove another act different from the act found by the prior verdicts ?

II. It is a matter of common occurrence that an information or indictment may be supported by evidence of more than one criminal act, either of which would justify a verdict of guilty. This results from the fact that the law does not require the allegations of the indictment to so identify an offense that it may not be established by proofs applicable to different acts. This results from the fact that time and some other things need not be proved as laid in the indictment. It, therefore, sometimes occurs that the evidence upon the trial tends to show distinct and different offenses. In such a case the courts will not permit the accused to be tried for all the offenses which the evidence tends to prove, and the jury to select one or more of the offenses upon which to base their verdict, but will require the state to elect for which offense a verdict will be asked. All evidence tending to show other offenses will be withdrawn from the jury, who will be instructed,—as they were in the case before us,—to confine their consideration to the offense named by the state, and to the evidence in its support. It will be understood that the accused was tried for but one offense. The indictment charges but one. The state did not elect the offense for which the accused was tried, but it did elect the evidence upon which it relied for conviction. Nor did the proof submitted upon the indictment make the case ; the case was designated by the indictment. The election of the evidence relied upon did not change the case. There was but one case. But the election related to the evidence, and selected that part upon which reliance for conviction was based. In the case before us, at the different trials, different evidence was designated by the election of the state's attorney. The same case was before the court at each trial. Counsel for defendant, therefore, incorrectly claim that by the change of election by the state a case was tried other than the one before tried. It was simply a change of evidence. It will hardly be

The State v. Dow.

claimed that upon a new trial of a criminal case the state is restricted to the evidence given at the former trial. The law contemplates nothing of the kind.

III. On an appeal from a justice of the peace by one convicted of an offense, the case stands "for trial anew in the district court in the same manner it should have been tried before the justice." And Code, section 4487, provides, in relation to proceedings in the district court, that "a new trial is a reëxamination of the issue in the same court, before another jury, after verdict had been given." The Code, section 4488, provides that "the granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew. * * *". These provisions are expressly applicable to proceedings in criminal cases. The new trial, or trial on appeal, is conducted as the first or original trial as to all proceedings and the admission of evidence. The prior trial stands for naught. The accused cannot claim that he was therein convicted or acquitted or put in peril. The new trial must conform to the requirements of the law, which we have seen authorizes the election by the state of the evidence upon which a conviction is asked; and it will be understood that the state cannot be restricted as to any evidence which tends to support the indictment. It follows that the evidence of the different acts was rightly admitted by the district court, and the state was rightly permitted to elect for which sale proved to the jury it claimed the conviction of defendant.

IV. Counsel for defendant cite *State v. Van Hallschuherr*, 72 Iowa, 541. It has no application to this case. It holds that a defendant cannot be tried on more than one count when all charge an offense in the same language.

AFFIRMED.

The State v. Keegan.

THE STATE V. KEEGAN.

Criminal Law : JURY TRIAL : VERDICT BY AGREEMENT. The defendant on a charge of larceny pleaded not guilty. and a jury was impaneled. Thereupon, by agreement between the district attorney and defendant, the jury returned a verdict of guilty. *Held* that this was equivalent to an admission by defendant of his guilt in open court and in the presence of the jury, and that the verdict could not be disturbed on the ground that it was not the result of a trial by jury.

Appeal from Black Hawk District Court.—HON. C. F. COUCH, Judge.

FILED, MARCH 10, 1888.

INDICTMENT for larceny from the person of another. Trial by jury, verdict of guilty, judgment, and the defendant appeals.

J. S. Darling, for appellant.

A. J. Baker, Attorney General, for the State.

SEEVERS, C. J.—The defendant pleaded not guilty, and a jury was impaneled to try such issue. Thereupon, by agreement between the district attorney and the defendant, the jury returned the following verdict: "We, the jury, find the defendant guilty of larceny from the person of another, as charged in the indictment," and on such verdict judgment was pronounced. It is said an issue of fact arises on a plea of not guilty, and that such issue must be tried by a jury. Code, secs. 4349, 4350. It is further said that a trial is a judicial examination of the issues, whether of law or fact, and, therefore, it is contended that the verdict was not rendered in accordance with the law, and is void. We are not prepared to concur in this proposition. To all intents and purposes the defendant

Ball & Co. v. Van Riper.

admitted his guilt in open court and in the presence of the jury. This presumption must be indulged in the absence of any showing to the contrary. Besides this, it does not appear that no evidence was introduced. In effect the defendant, with a plea of not guilty on file, admitted his guilt; and, as this was done in open court, the jury were fully warranted in acting upon such admission and finding the verdict. Under the admission made, it was the only verdict the jury could have found, and the fact that the form was agreed upon between the state and defendant is immaterial.

AFFIRMED.

BALL & CO. v. VAN RIPER *et al.*

Appeal : LESS THAN ONE HUNDRED DOLLARS : CONTENTS OF CERTIFICATE. Where an appeal involves less than one hundred dollars, it is necessary, in order to give this court jurisdiction, for the trial judge to state that the questions of law certified by him are involved in the cause. (Compare *Van Sickle v. Downs*, 72 Iowa, 624.)

Appeal from Franklin Circuit Court.—HON.
D. D. MIRACLE, Judge.

FILED, MARCH 10, 1888.

THE facts are stated in the opinion.

D. W. Henley, for appellant.

Taylor & Evans, for appellee.

SEEVERS, C. J.—The amount in controversy is less than one hundred dollars, and the certificate of the trial judge is as follows: "At the request of the defendants, the court certified the following questions of law, on which it is desirable to have the opinion of the supreme court." It will be observed that the certificate fails to state that the questions certified are involved in the cause, and it is, therefore, insufficient. *Van Sickle v. Downs*, 72 Iowa, 624. The appeal must be

DISMISSED.

Coffman v. Acton.

COFFMAN V. ACTON.

1. **Appeal : QUESTIONS NOT RULED ON BELOW : EXAMPLE.** The issues raised and tried below, in an action to recover money as specific personal property, were whether defendant had received the money into her actual possession and assumed the care of it ; and whether she had it in her possession when the action was brought ; and the court found generally for defendant. *Held* that, on this state of the record, the question whether the action would lie, when the property sought to be recovered was money, could not be considered on appeal.
2. ——— : **EVIDENCE TO SUSTAIN FINDING OF COURT.** Where there is a fair conflict in the evidence on which the finding of the court in an ordinary action is based, it will not be disturbed on appeal for want of support in the evidence.

Appeal from Pottawattamie District Court.—HON.
GEORGE CARSON, Judge.

FILED, MARCH 10, 1888.

ACTION for the recovery of specific personal property. Trial by the court without the intervention of a jury. Judgment for defendant. Plaintiff appeals.

E. A. Babcock and Lyman & Hunter, for appellant.

A. W. Askwith and Fremont Benjamin, for appellee.

REED, J.—Plaintiff sought by this action to recover possession of gold coin of the value of one hundred and twenty dollars, which he alleges he deposited with defendant, and she refused to return to him on demand. Counsel have argued the question whether “the action for the recovery of specific personal property” will lie when the property sought to be recovered is money, but it does

1. **APPEAL :**
questions not
ruled on be-
low : example.

Coffman v. Acton.

not appear that that question was determined by the court below. Defendant's answer was a general denial of all the allegations of the petition, and the parties tried the questions of fact, whether defendant received the money into her actual possession, and assumed the care of it, and whether she had it in her possession when the action was brought; and the court found generally for defendant. On that state of the record, we cannot presume that the court determined as matter of law that, owing to the nature of the property, there could be no recovery. In ordinary actions we can review only such questions as by the record appear to have been passed upon by the trial court.

Counsel for the appellant contend that the finding of the court is contrary to the evidence. Plaintiff testified that he handed the money to defendant, and requested her to keep it until he called for it, and that she promised to do so, but that she afterwards, on his demanding its return, refused to surrender it. He also produced other witnesses, whose testimony tended to prove certain admissions by defendant that she had received the money for safe-keeping, under a promise to deliver it on demand. Defendant testified that plaintiff came to her home in the absence of her husband, and that he offered to deliver the money to her, and requested her to receive and keep it until he should call for it; but that she refused to receive it, and requested him to take it away, but that he placed it on the table, and went away, leaving it there; and that, on the return of her husband, she pointed it out to him, and related the circumstances under which it had been left there; and that he took possession of it. Also that she was afterwards subpoenaed to produce the money before the mayor of the town on the trial of a criminal action against plaintiff; and that she procured it from her husband for that purpose, but afterwards returned it to him, and that she did not afterwards have it in possession. The burden was on plaintiff to prove that defendant, at some time before the action was brought, had the money in her

2. —: evidence
to sustain
finding of
court.

Richardson v. Woodring.

actual possession, and that she received it under such circumstances that she was bound to surrender it to him. It is manifest from the foregoing statement of the evidence that there was a substantial conflict on that question. The case must, therefore, be disposed of under the settled rule, that this court will not in an ordinary action disturb the finding of the jury or trial court on a question of fact, when there is a fair conflict in the evidence. The rule has so long prevailed, and has so often been applied, that it is not now necessary to re-state the grounds of it, or cite the cases holding it.

AFFIRMED.

RICHARDSON *et al.* v. WOODRING *et al.*

1. **Fraudulent Conveyance: OF STOCK OF GOODS: EVIDENCE.**
The evidence in this case considered (see opinion) and *held* to be sufficient to prove that the conveyance of the stock of goods in question was made and accepted for the purpose of defrauding creditors.
2. **Appeal: QUESTION NOT RAISED BELOW.** An issue not raised in the pleadings nor referred to in the evidence cannot be heard in this court.

Appeal from Carroll District Court.—HON. J. P.
CONNER, Judge.

FILED, MARCH 10, 1888.

THIS is an action in equity by which the plaintiffs, who are creditors of the defendant R. R. Woodring, seek to subject certain goods and chattels to the payment of their claims, upon the ground that said defendant mortgaged and sold said goods to the other defendants in such a way as to constitute a general assignment, with preferences to the defendant creditors. It is also claimed that a sale of the goods to defendant J. W. Coppock was fraudulent, as being made with intent to hinder, delay and defraud the creditors of Woodring. Issues were joined by the parties, and a trial was had, which resulted in a decree for the plaintiffs, from which defendants appeal.

Richardson v. Woodring.

Beach & Hoyt and F. M. Powers, for appellants.

George R. Cloud, for appellees.

ROTHROCK, J.—I. On the twenty-eighth day of June, 1886, the defendant R. R. Woodring was the owner of a stock of furniture, undertaking and upholstery goods at Carroll, Iowa. On that day he executed a chattel mortgage on said stock to A. W. Patterson, to secure the payment of one thousand and twenty-one dollars, and same was filed for record on the twenty-ninth day of June, 1886, at nine o'clock in the morning. On said twenty-eighth day of June, he executed another mortgage upon the stock to Nicholas Woodring for about twenty-three hundred dollars, and the same was filed for record on the twenty-ninth of June at eleven o'clock in the forenoon; and on the same day that he executed said mortgages he sold the whole stock to defendant Coppock, and executed to him a bill of sale therefor, which was filed for record June 29, 1886, at 1:30 o'clock p. m. By the terms of this bill of sale Coppock assumed the payment of the mortgages to the other defendants. The defendant Woodring is the owner of a hearse and harness which was not included in the mortgages, but was transferred by the bill of sale to Coppock. After hearing all the evidence, and upon a full trial upon the merits, the court decreed that the hearse and its attachments and the set of double harness should be held subject to the payment of the claims of the plaintiffs. The effect of this decree was to uphold the mortgages as valid liens, and to defeat the sale to Coppock only so far as not to affect the mortgage liens. The plaintiffs do not appeal, and it is only necessary to consider whether the decree subjecting the hearse and harness to the payment of the plaintiffs' claims is in accord with the preponderance of the evidence. And this inquiry does not necessarily involve the question whether these several transactions

1. FRAUDULENT
conveyance
of stock of
goods: evi-
dence.

Richardson v. Woodring.

amounted to a general assignment. The district court doubtless found from the evidence that the sale of the goods from Woodring to Coppock was a fraud upon the creditors of Woodring, and in our opinion that conclusion is in accord with a decided preponderance of the evidence. We will not set out the evidence in detail. It is sufficient to state some of the proven facts which, with others not stated, lead to the conclusion that the sale was properly held to be fraudulent. Coppock was, and for ten years had been, engaged in mining, and had no knowledge of the furniture business. He was not a creditor of Woodring. He had been for years at the Black Hills, in Dakota Territory. Some correspondence was had between him and Woodring about buying the goods. He came to Carroll on the evening of June 28, 1886, and took the bill of sale and recorded it after the mortgages were executed. No invoice of the goods was made after he came, but he claims he bought on the faith of an invoice which Woodring stated to him had been made a short time before. He knew before he closed the deal that the goods were mortgaged for about two-thirds their value, or thereabouts. He took possession, and in a few months went to Africa to engage in the mining business. He left the store in charge of a son of the defendant Woodring. It will be observed that Coppock was not a creditor. He volunteered to purchase a stock of goods for over five thousand dollars, which he knew was mortgaged for thirty-three hundred dollars. He made his purchase without knowing anything of the value of the goods except the statement of Woodring. These and other established facts which might be stated lead the mind to the conclusion that the sale was fraudulent. There is no doubt that it was fraudulent on the part of Woodring, and that, to say the least, Coppock was in possession of such facts as should have put him upon inquiry before closing the purchase.

II. It is urged by counsel for appellant that the hearse and harness should not be subjected to the

McLane v. Granger.

2. APPEAL : payment of Woodring's debts, because
question not they are exempt from execution. It is
raised below. sufficient to say in answer to this claim that
no such issue was made in the pleadings, and no
evidence was introduced showing the said property to
be exempt. The question cannot be raised for the first
time in this court.

AFFIRMED.

McLANE V. GRANGER.

Constitutional Law : VIOLATION OF INJUNCTION : COMMITMENT FOR CONTEMPT IN VACATION. When a judge is authorized by statute to perform a judicial act in vacation, his act, when so done, has the force and effect of an act done by the court (following *State v. Myers*, 44 Iowa, 580); and so, in this case, *held* that section three, chapter sixty-six, Laws of 1886, authorizing a judge in vacation to commit for contempt of an injunction issued under the prohibitory liquor law, is not in conflict with section one, article five, of the constitution, on the ground that it authorizes judgment by one who is not a court within the meaning of the constitution.

ON CERTIORARI TO HON. C. T. GRANGER, Judge of the
Thirteenth Judicial District.

FILED, MARCH 10, 1888.

ON plaintiff's petition a writ of *certiorari* was allowed by one of the judges of this court to review an order of the defendant, who is a judge of the district court in the Thirteenth judicial district, imposing a fine upon plaintiff, and committing her to jail for contempt.

L. Bullis and *C. Wellington*, for plaintiff.

A. J. Baker, Attorney General, and *J. B. Kaye*,
County Attorney, for defendant.

REED, J.--A temporary writ of injunction was issued and served upon plaintiff, enjoining and restraining her from keeping and using a certain building for the purpose of keeping or selling intoxicating liquors therein

McLane v. Granger.

contrary to law. An information was afterwards filed before the judge, in vacation, charging plaintiff with having violated said injunction. He thereupon caused her to be attached and brought before him. Her counsel filed a plea to the jurisdiction of the judge, denying that he had any power to hear and determine the matter in vacation. He, however, overruled the plea, and proceeded to hear the evidence adduced, and found therefrom that she was guilty of contempt as charged in the information, and entered an order imposing a fine of five hundred dollars, and, in default of payment, committing her to jail for one hundred and fifty days. The complaint and evidence (which was taken in writing at the hearing) were filed in the office of the clerk of the district court of Winneshiek county; that being the county in which the injunction proceedings were pending, and in which the hearing was had. The order was also entered of record in the judgment record of that court.

The objection urged against the proceeding is that the statute under which it was had (sec. 3, ch. 66, Acts 21st Gen. Assem.) is in conflict with section one, article five, of the constitution of the state, which is as follows: "The judicial department shall be vested in a supreme court, district court, and such other courts, inferior to the supreme court, as the general assembly may from time to time establish." Plaintiff's position is that the order imposing a fine and imprisonment for contempt is a final judgment, which can be pronounced only upon a hearing by a court; and that the judge, who is but an officer of the court, cannot, under that provision, be empowered to hear and determine a matter in litigation, and pronounce final judgment thereon, except when acting under such circumstances that the judgment pronounced by him is the judgment of the court, and that that can only be when the judgment is pronounced when the court is in session. We think, however, that the question is disposed of by our holding in *State v. Myers*, 44 Iowa, 580. We held, in that case, that, when the judge is authorized by

Deeds v. The Chicago, R. I. & P. Ry Co.

statute to perform a judicial act in vacation, his act, when so done, has the force and effect of an act done by the court. Following that holding, the writ of *certiorari* will be

DISMISSED.

74	154
89	426
74	154
108	601

DEEDS V. THE CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY.

1. **Instructions: NOT WARRANTED BY EVIDENCE.** An instruction based on assumed facts of which there is no evidence is erroneous. (See opinion for illustration.)
2. **Railroads: INJURY TO BRAKEMAN: VIOLATION OF RULE: INSTRUCTIONS.** In an action by a brakeman for injuries received while attempting to couple cars on defendant's road, the court rightly instructed the jury that a certain rule of the company in relation to the care to be exercised in coupling cars was a proper one (see opinion for rule), and that obedience thereto was incumbent on plaintiff; but in another instruction the jury were advised, in substance, that plaintiff might recover, even though he violated the rule, if he was not guilty of negligence in any other respect. *Held* that the last instruction was erroneous, because it substituted the judgment and discretion of the plaintiff in place of the rule.

Appeal from Washington District Court.—HON. J. KELLEY JOHNSON, Judge.

FILED, MARCH 10, 1888.

THE plaintiff was a brakeman in the employ of the defendant on a freight train, and was injured while attempting to make a coupling of a moving train to a stationary freight car. Trial by jury, verdict for plaintiff, and judgment. The defendant appeals.

T. S. Wright and *H. & W. Schofield*, for appellant.

No appearance for appellee.

SEEVERS, C. J.—I. At the time the plaintiff was injured, the following rule adopted and promulgated by the defendant was in force: “Brakemen and switchmen, in coupling or uncoupling cars, must not assume that signals given to the engineer or fireman will be obeyed, when obedience to a signal thus given by a brakeman or switchman to an engineer or fireman is essential to the safety of the brakeman or switchman in the performance of a duty. He must know that the signal must be understood, and is obeyed, before he places himself in a position of danger, relying on such obedience. When he acts without such knowledge, he assumes all risk of danger arising from misunderstanding or disobedience of signals.” The plaintiff had knowledge of such rule, and the movement of the train was controlled by signals given by him to the fireman, who was acting as engineer at the time. The accident occurred at Muscatine, about two o’clock in the morning, in October, 1885. The plaintiff testified: “In undertaking to make the coupling, * * * I gave the signal to stop,” walked in, took hold of the link, and got caught. * * * After giving the signal I walked off to make the coupling. * * * The train was going very slow when I gave the stop signal. About the time I took hold of the link, there was a sudden jerk, increasing the speed. It had a short distance to go, but I think they doubled that speed anyway. When I gave the signal to stop I did not intend them to stop immediately; I intended for them to slack up, or not to come any faster, not to work any more steam. * * * I did not expect them to go any faster. I did expect that they might go faster unless I told them not to. They are liable to if they do not get a signal. It is not customary to increase the speed without a signal. It is sometimes done, when an engineer gets a signal to back up. Sometimes he relies on his own judgment. * * * If they do not get a signal to slacken up in the course of business, they use their own judgment, and increase the rate of speed. Sometimes that occurs in the course

Deeds v. The Chicago, R. I. & P. Ry. Co.

of business." The court instructed the jury that if the plaintiff violated the foregoing rule, and such violation contributed to his injury, he could not recover unless the defendant had waived the rule.

II. The court instructed the jury, in substance, that the fact that the rule was violated by brakemen

1. INSTRUCTIONS: not warranted by evidence. would not justify the plaintiff in doing so, unless some one or more of defendant's officers, charged with the enforcement of

the rule, knew it was customarily violated; but that the knowledge of such officers of the violation of the rule would amount to a waiver thereof. There is no evidence tending to show what officer or officers adopted and promulgated the rule, nor is there any evidence tending to show that any officer, charged with the enforcement of the rule, knew that it was violated, and, therefore, the instructions given the jury in relation thereto are erroneous. It is true, there is evidence tending to show that one White was trainmaster, and that his division extended from Eldon to Rock Island; and, assuming that it was a question for the jury whether he was charged with the enforcement of the rule, there is evidence tending to show that White saw, or had the opportunity of seeing, the manner of making couplings in the yard at Eldon. But there is no evidence tending to show that he had knowledge that the switchmen in the yard at Eldon went between cars, when in motion, to make couplings, when they knew the signal given by them had not been seen by the engineer in charge of the train. The knowledge of White was confined to the yard at Eldon, where the couplings are made by switchmen, and it does not necessarily follow that, conceding he had knowledge that the rule was violated by switchmen, therefore, he knew it was violated by brakemen, or that, if waived as to switchmen, it was also waived as to brakemen.

III. The court instructed the jury as follows:

"If the usual effects of the signal given was to slacken up the speed of the train, and the speed was

Deeds v. The Chicago, R. I. & P. Ry. Co.

2. RAILROADS : not slackened within a reasonable time after
injury to the signal was given, and the plaintiff
brakeman : knew this, it would tend to show that he
violation of rule : instructions. knew the signal was not being obeyed.

But if the speed was not such as to render it dangerous, in the exercise of ordinary care, to commence preparation for coupling on to the train, and you find that the plaintiff did so place himself with such care, and you further find that, when the train was within a very short distance of the car to be coupled, the speed of the train was suddenly, and without warning to plaintiff or a signal for an increase of speed, materially increased so as to render it dangerous to be between the cars attempting to couple the same, and you further find that, in the exercise of ordinary diligence and care, he could not have withdrawn from between the cars after he knew of such increase of speed, then, and in such case, the existence of such rule would not prevent a recovery, if the plaintiff is otherwise entitled to recover under the evidence and these instructions."

As the court had instructed the jury that the rule was a proper one, and should be enforced, it necessarily followed that, if it was violated by the plaintiff, he could not recover, and the jury were so instructed. Under the rule it was incumbent on the plaintiff to know that his signal had been seen by the person in charge of the engine. He had no right to assume that it had been seen, or to act upon his judgment that the speed was such that he could make the attempt to make the coupling, whether his signal had been seen or not. He had no right to determine that the speed was not dangerous, and, therefore, it was immaterial whether his signal had been observed. For he knew that, unless his signal had been seen, the speed of the train was sometimes increased by the engineer, and this very thing occurred in this case, and was the cause of the accident. The vice of the instruction is that the judgment and discretion of the brakeman are substituted for and take the place of the rule. It is obvious that this instruction abrogates the rule, and if such be the

Finnegan v. Campbell.

proper construction, then it is useless to establish rules, and yet it is right, proper and prudent for railroad companies to do so, if such is not their duty. *Cooper v. Central Railroad of Iowa*, 44 Iowa, 138; *O'Neil v. Keokuk & Des Moines Ry. Co.*, 45 Iowa, 547; *Pittsburg, Ft. W. & C. Ry. Co. v. Powers*, 74 Ill. 344; *Lockwood v. Chicago & N. W. Ry. Co.*, 55 Wis. 50; Beach, Contrib. Neg., sec. 141.

It is not deemed material to determine the other errors discussed by counsel.

REVERSED.

FINNEGAN V. CAMPBELL.

1. **Occupying Claimant : COLOR OF TITLE : WHAT IS.** The plaintiff procured a judgment against defendant for the possession of the land in controversy. There was evidence sufficient to show that the defendant was in the occupancy of the land when the judgment was rendered, and that at that time more than two years had elapsed since he had paid the taxes on the land, and that plaintiff never offered to repay the same to him. *Held* that these facts were sufficient, under Code, section 1983, to show color of title in defendant, so as to entitle him to recover for improvements made under the occupying claimant law.
2. **Former Adjudication : ISSUE WITHDRAWN.** An issue raised by answer, but withdrawn by the defendant before trial, cannot be said to be adjudicated in the determination of the cause.

Appeal from Cerro Gordo District Court.—HON. JOHN B. CLELAND, Judge.

FILED, MARCH 10, 1888.

PROCEEDING to recover for permanent improvements on real estate, under the statute giving relief to occupying claimants. The court, on the ground that the defendant had failed to show color of title, directed the jury to find for the plaintiff, and defendant appeals.

Blythe & Markley, for appellant.

McConlogue & Miller, for appellee.

Finnegan v. Campbell.

SEEVERS, C. J.—In April, 1885, the plaintiff commenced an action of right against the defendant, to recover possession of the northeast quarter of section eighteen, township ninety-four, range nineteen, in Cerro Gordo county. The defendant answered the petition, alleging ownership in himself. In January, 1887, judgment was rendered for the plaintiff, and on the eighth day of February thereafter the defendant filed a petition, claiming to recover for improvements made in good faith under color of title. It is stated in the petition, claiming under the occupying claimant law, that the defendant purchased the real estate of the plaintiff through his agent, and that he had paid the taxes on the said land in March, 1884, and that plaintiff had not offered to return the same. The improvements made were sufficiently described. The plaintiff denied the allegations of the petition, and pleaded that the plaintiff, in September, 1884, had commenced an action for rent due for the use and occupancy of the premises; that the defendant denied the allegations of the petition, and pleaded the same contract of purchase as a defense to such action as is pleaded in the present proceeding; and that the plaintiff was successful in such former action; and that the defendant is thereby estopped from pleading the same matter in this proceeding. There was evidence tending to show that one Dougherty, as agent for the plaintiff, sold to the defendant the land in controversy, and that he, as such agent, entered into a written contract which provided that, upon compliance with the terms and conditions thereof on the part of the defendant, the plaintiff agreed to convey the real estate to the defendant. The evidence also tended to show that the defendant occupied said premises under the contract, and made permanent improvements thereon, and that he in March, 1884, paid the taxes due thereon. There is no evidence which tends to show that the plaintiff offered to repay said taxes. There is also evidence which tends to show that the plaintiff never repudiated

Finnegan v. Campbell.

the authority of Dougherty to sell the land or to execute the written contract; on the contrary, there is evidence which tends to show that plaintiff, for a time, recognized the possession of the defendant under the contract. The grounds on which it was held that the defendant was not vested with an equitable title do not certainly appear; but the probabilities seem to be that he failed to comply with some of the conditions of the written contract.

I. Whether the defendant had color of title under the written contract of purchase is unnecessary to determine. But there remains the question
 1. OCCUPYING claimant: color of title: what is. whether he had such title because he paid the taxes on the real estate. The statute provides that "any person has the requisite color of title who, during his occupancy, has paid the ordinary county taxes for any one year, and two years thereafter have elapsed without a repayment of the same by the owner of the land, and such occupancy is continued up to the time at which the suit is brought by which the recovery of the land is obtained." Code, sec. 1983. There is evidence tending to show that the defendant occupied the land when judgment in the action was obtained, and at that time more than two years had elapsed since he paid the taxes; and, as the plaintiff at no time offered to repay the same, we think that the defendant, under the express words of the statute, had color of title, and the court erred in holding that he had not.

II. Counsel for the plaintiff contend that the question whether the defendant had color of title was adjudicated in the action brought to recover
 2. FORMER adjudication: issue withdrawn. rent. A conclusive answer to this objection is that the defendant struck out of or withdrew so much of his answer as pleaded the written contract as a defense, in such action, prior to the trial thereof. Therefore, it seems to us that the question whether he had color of title was not determined in that action.

III. Counsel for the appellant further object that,

Norton v. Norton.

as the defendant claims that he purchased the land, it was his duty to pay the taxes, and that such taxes cannot be recovered by an occupying claimant, under the decision in *Garrigan v. Knight*, 47 Iowa, 525, and *Read v. Howe*, 49 Iowa, 65. We do not understand that the defendant is seeking to recover the taxes so paid, or if he is, we do not understand that his right to recover is necessarily involved in this appeal. It is sufficient to say that the main object of this action is to recover for permanent improvements, and that the only question we are required to determine is whether the defendant had color of title. He paid the taxes in good faith, under the belief that he was a purchaser of the land; at least, the evidence so tends to show. But it turns out that he was not a purchaser; still, as he was rightfully occupying the land and had paid taxes, he, under the statute, had color of title. It is true, it does not appear that the defendant had occupied the premises for five years; but the question whether the improvements were made with the knowledge, express or implied, of the plaintiff, was for the jury, as there was evidence tending to show such knowledge.

REVERSED.

NORTON V. NORTON *et al.*

Conveyance : FATHER TO CHILDREN : UNDUE INFLUENCE : RESCISSION.

The facts in this case examined (see opinion) and *held* to show that conveyances made by an aged father to his children were procured by undue influence, and through a groundless fear on his part that he was about to be involved in litigation through which he might lose his property. Accordingly, the decree of the district court for a reconveyance of the property is affirmed.

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, MARCH 10, 1888.

VOL. 74—11.

THIS is an action in chancery, by which the plaintiff seeks to set aside certain conveyances of real estate made to the defendants, who are his children. There was a trial in the district court upon the merits, and a decree for the plaintiff. Defendants appeal.

J. W. Jamison, for appellants.

E. Keeler, for appellee.

ROTHROCK, J.—The plaintiff is about seventy-six and his wife seventy-four years of age. They married in their youth, and acquired a farm of one hundred and sixty acres, and forty acres of timber land, some distance from the farm. The land was entered by the plaintiff and purchased from the government. They raised a large family of sons and daughters. About the year 1882, the plaintiff was stricken with paralysis, and since that time he has been unable to perform any labor, and requires constant attention. His wife is very feeble, and at times subject to sickness, and requires nursing and care. All of the evidence shows that, since the affliction of the plaintiff, he and his wife are two helpless old people, unable to care for themselves. In December, 1884, the plaintiff divided up his farm among his children, and made deeds to them for the parts allotted them respectively. At this time a son named Elihu, with his wife, were living in the house on the homestead, and taking care of the old people. The homestead forty acres were conveyed to Elihu, and thirty acres were conveyed to a son named James. All of the deeds reserved the right of possession of the land in the plaintiff during his life. The plaintiff claims that at the time he made the deeds he was weak in body and mind, easily imposed upon, and unable to make an intelligent disposition of his property, and that he was induced to make the deeds by his two sons, James and Elihu, in whom he had great confidence, and who had great influence over him. He further claims that he conveyed the homestead forty acres to Elihu, on the

Norton v. Norton.

promise by him to remain with the plaintiff, and keep and care for him during his life; that Elihu has broken his promise and moved away from the farm. He further claims that said two sons falsely represented to him that his son-in-law, named Gearhart, was about to commence an action against him for a large claim, and thereby induced him to convey his property, so as to defeat the claim of Gearhart; whereas, in truth and in fact, Gearhart never intended to assert a claim against him.

The evidence in the case is quite voluminous. We have given it a most careful consideration, and our conclusion is that the decree of the district court ought to be affirmed. In fact, all of the children to whom deeds were made are content with the decree, except James and Elihu, who alone appeal. The evidence shows quite clearly that the plaintiff was, to say the least, of weak mind when he made the deeds, and that by reason of the implicit confidence he placed in these two sons, they had the power to influence him to do acts which ought not to be binding upon him. We make no account of the promise of Elihu to support him during his life. There is one fact which stands out prominent through all the evidence. It is that the old man was impressed with the belief that Gearhart was about to prosecute a claim against him, which would sweep away all his property; and there is no doubt in our minds that the appellants knew that their father was laboring under this delusion. The haste with which the deeds were made, and the anxiety of the old man to have his property out of his name, was known to them. They knew that Gearhart had before that lived with the plaintiff, and taken care of him and his wife, and that he moved away because, as he alleged, he was not paid for his services. Now, even if appellants did not actively promote the fear of financial disaster which the plaintiff believed might overtake him, they knew of it—knew of his weak and dependent condition; and they ought not to be allowed to take advantage of the infirmity and delusion of their father. One of the most

Judge v. Flourney.

potent facts showing that the old man was almost an imbecile is that he supposed that, if he would convey his property to his children without consideration, it would be free from any claim Gearhart might have against him. When he became dissatisfied with the transaction, these two appellants expressed a willingness to reconvey the property if the other children would do so. The decree in the court below against the others operates as a reconveyance by the others, and we think that plaintiff should be reinvested with the title to the whole farm.

AFFIRMED.

JUDGE V. FLOURNOY *et al.*

Intoxicating Liquors : UNLAWFUL SALE : LIABILITY OF PROPERTY-OWNERS : KNOWLEDGE AND CONSENT. In order to make saloon property liable for judgments based upon the unlawful sales of intoxicating liquors therein, it is sufficient to allege and prove knowledge by the owners of such property of such unlawful sales, without alleging and proving their consent. (Compare sec. 12, ch. 66, Laws of 1886).

Appeal from Clinton District Court.—HON. C. M. WATERMAN, Judge.

FILED, MARCH 10, 1888.

ACTION by a wife against the keeper of a saloon and the owners of the property wherein it was kept, to recover for sale of intoxicating liquors to her husband, causing his intoxication. While in that condition he fell in the street, and was so frozen that the amputation of one of his legs became necessary. A demurrer to the petition by defendants, who are the owners of the property in which the saloon was kept, was sustained. Plaintiff appeals.

J. S. Darling, for appellant.

Walter I. Hays and *A. L. Schuyler*, for appellees.

BECK, J.—I. The petition alleges that the saloon was kept in the property with the knowledge of the owners thereof, who are made defendants. The demurrer is upon the ground that the petition does not allege that the sale of liquors upon which the action is based was with the consent and knowledge of the defendants, who are the owners of the property. In our opinion, it was erroneously sustained.

II. Code, section 1558, provided that judgments in actions of this character could be enforced against property used for the unlawful sale of intoxicating liquors “with the consent and knowledge of the owner.” This section was repealed by chapter sixty-six, section twelve, Acts Twenty-first General Assembly, and another provision enacted in lieu thereof, making the property wherein intoxicating liquors are unlawfully sold liable, if it be occupied and used for such purpose “with the knowledge of the owner thereof.” Under the former statute, this court, following its very language, held that to fix the liability of the property it must be used for the unlawful purpose with the consent and knowledge of the owner. Under the statute now in force, consent of the owner need not be averred in stating the liability, nor shown in proving it, for the very reason that it is not so written in the statute. Following the language of this statute, we hold that the petition stated a cause of action. The lessor of property, when it is appropriated by the tenant to unlawful purposes, may cancel the lease and oust the tenant. If he does not exercise this power, as a good citizen ought, he assents to the violation of law by his tenant, and cannot, therefore, complain when his property is held liable for the penalty of damages incurred. *Martin v. Blattner*, 68 Iowa, 286.

III. Counsel for defendants argue that the intention of the legislature in this regard was the same as is expressed in the language of the former enactment. Their argument urges a construction based upon a supposed intention, which is in conflict with the plain lan-

Judge v. O'Connor.

guage of the enactment. Such a construction courts will never adopt; but we confess that the supposed intention, even were it not in conflict with the language of the statute, too dimly appears to guide to the conclusion that it was in the mind of the law-makers. It is our conclusion that the decision of the district court sustaining the demurrer is erroneous. It must, therefore, be

REVERSED.

JUDGE V. O'CONNOR.

1. **Intoxicating Liquors : UNLAWFUL SALES : LIABILITY OF PROPERTY-OWNERS : KNOWLEDGE AND CONSENT.** *Judge v. Flourney, ante*, p. 164, followed. See head-note to that case, and cases distinguished in the opinion in this case.
2. ——— : ——— : ——— : **KNOWLEDGE OF PARTICULAR SALE.** Property used for the unlawful sale of intoxicating liquors is liable for fines, costs and judgments assessed or rendered for violations of the prohibitory liquor laws, which occur after the owner is chargeable with knowledge that his property is being used for the prohibited purpose; and it is not necessary to show that he had knowledge of the special sale or sales on which the judgment sought to be enforced is based.

Appeal from Clinton District Court.—HON. C. M. WATERMAN, Judge.

FILED, MARCH 10, 1888.

PLAINTIFF seeks to recover for injury to her means of support, caused by the alleged sale of intoxicating liquors to her husband contrary to law. The action was brought against one Jordan, who is charged with having sold the liquor, and against Patrick O'Connor, as the owner of the premises on which the sale was made. O'Connor demurred to the petition. His demurrer was sustained, and judgment rendered in his favor for costs. Plaintiff appeals.

Judge v. O'Connor.

J. S. Darling, for appellant.

Ellis & McCoy, for appellee.

ROBINSON, J.—The petition alleges that Jordan carried on the business of keeping with intent to sell, and selling, intoxicating liquors as a beverage, contrary to law, in a saloon situated on a lot described in the city of Lyons; that said business has been carried on for the last three years, with the knowledge of O'Connor; that O'Connor is the owner of the property; that on the second day of January, 1887, Jordan caused the intoxication of the husband of plaintiff by selling to him in said saloon intoxicating liquor; that such sale was contrary to law; that in consequence of such intoxication said husband fell, and lay for a long time in the street, and was badly frozen; that, as a result of such freezing, one of the legs of the husband was amputated, and he was permanently disabled, and is wholly unable to perform any labor; that, in consequence of the said unlawful act of Jordan, the plaintiff is wholly deprived of her means of support. She demands judgment against Jordan, and asks that it be made a lien on the saloon premises.

I. O'Connor demurred to the petition on the ground that it "fails to state that he consented to the unlawful business aforesaid, and consented to the sale in the petition complained of."

1. INTOXICATING
liquors:
unlawful
sales: liability
of property-
owners:
knowledge
and consent.

Was it necessary for plaintiff, in making a *prima-facie* case as against the property, to show, and, therefore, to allege, that O'Connor not only knew that the business carried on in it was unlawful, but also that he had consented to it? Section three, chapter forty-seven, Acts 1862, provided that for judgments rendered against any person for violation of the laws of the state relating to the suppression of intemperance, the property "used for that purpose with the consent or knowledge of the owner thereof, or his agent," should be liable. The case of *Polk County v. Hierb*, 37 Iowa, 364, arose under that

Judge v. O'Connor.

section, and the language of the opinion in that case gives color to the claim of appellant that it was then sufficient to show either knowledge or consent of the property-owner. The provisions of the section we have considered were incorporated in section 1558 of the Code. But that section as printed authorized a lien on the premises only when they had been used for the unlawful purpose with the "consent *and* knowledge" of the owner. *Cobleigh v. McBride*, 45 Iowa, 116; *Meyers v. Kirt*, 57 Iowa, 421, and 64 Iowa, 27; *Loan v. Etzel* 62 Iowa, 429. The question now under consideration arises under section 1558 of the Code, as amended by section twelve, chapter sixty-six, Acts Twenty-first General Assembly. Its language, so far as is material to this inquiry, is as follows: "For all fines and costs assessed, or judgments rendered, of any kind, against any person, for any violation of the provisions of this chapter, or costs paid by the county on account of such violations, the personal and real property, except the homestead and the personal property of such person which is exempt from execution, as well as the premises and property, personal or real, occupied and used for the purpose, with the knowledge of the owner thereof or his agent, by the person manufacturing or selling, or keeping with intent to sell, intoxicating liquors contrary to law, shall be liable; and all such fines, costs and judgments shall be a lien on such real estate until paid; * * * and evidence of the general reputation of the place shall be admissible on the question of knowledge, and written notice given him or his agent by any citizen of the county shall be sufficient to charge the owner with knowledge under the provisions of this section." It is evident that the amendment of 1886 made a radical change in the law. It is no longer necessary to show consent of the owner to the unlawful use of his property before it can be made liable. It is sufficient for plaintiff, in order to make out a *prima-facie* case for holding the property liable, to show that the unlawful use was with the knowledge of the owner. If, notwithstanding that fact, the property is not liable, the

Shively v. The Cedar Rapids, I. F. & N. W. Ry. Co.

burden of showing it is on the owner: As having some relevancy to this case, see *Drake v. Kingsbaker*, 72 Iowa, 441. As being a case in point, see *Judge v. Flourney*, ante, p. 164.

II. Is it necessary to show that the owner had knowledge of the illegal sale which caused the injury in question, before his property can be made liable? We think it is not. Under the provisions of section 1558 of the Code, as amended, the knowledge to which the owner is entitled may be shown by proving the general reputation of the place, or by proving that a written notice by any citizen of the county was given to him or his agent. But the property cannot be made liable for an illegal sale of which the owner had neither actual nor constructive knowledge until after it was made. We think it was the legislative intent to make the property liable for fines, costs and judgments assessed or rendered for violations of the laws in question, which occur after the owner is chargeable with knowledge that his property is being used for the prohibited purpose. In our opinion the court erred in sustaining the demurrer.

REVERSED.

SHIVELY V. THE CEDAR RAPIDS, IOWA FALLS & NORTHWESTERN RAILWAY COMPANY *et al.*

1. **Instructions:** WHOLE CHARGE TO BE CONSIDERED. An instruction which, by itself, might be partial and misleading is no ground for reversal when the whole charge is such as to present the case fully and fairly to the jury.
2. **Nuisance:** TEMPORARY: MEASURE OF DAMAGES. In an action for damages to a dwelling-house caused by a nuisance which is not necessarily a permanent one, but which the defendants may at any time abate, the measure of damages is the depreciation in the rental value of the premises during the time the nuisance is maintained.

74	169
86	354
74	169
94	91

74	169
100	683
74	169
116	73
116	77

74	169
119	477

74	169
123	335

74	169
140	434
140	435

Shively v. The Cedar Rapids, I. F. & N. W. Ry. Co.

8. ———: DAMAGES: STOCK-YARDS NEAR DWELLING: NECESSITY OF RAILROAD. Where the defendants erected stock-yards so near to plaintiff's dwelling, and so kept them, that the odors therefrom were not only an annoyance, but were unwholesome, threatening the health of plaintiff and his family, *held* that defendants could not escape liability on the ground that the yards were necessary to the operation of defendants' railroad, and that the odors complained of could not be avoided, there being no showing of such facts in defense. (*Dunsmore v. Cent. Iowa Ry. Co.*, 72 Iowa, 182, *distinguished*).

Appeal from Lyon District Court.—HON. GEO. W. WAKEFIELD, Judge.

FILED, MARCH 10, 1888.

ACTION to recover damages caused by an alleged nuisance. The case was tried to a jury, and verdict and judgment rendered for plaintiff. Defendants appeal.

Van Wagenen & McMillen and *S. K. Tracy*, for appellants.

J. M. Parsons, for appellee.

ROBINSON, J.—The plaintiff alleges that he is the owner of a house and lot in the town of Rock Rapids, which he occupies as a home; that, in September or October, 1886, the defendants built, and have since maintained, within sixty feet of said lot, stock-yards for the use of shippers over the road of defendants; that said stock-yards have become foul and a nuisance, emitting foul and unhealthy odors, so as to render plaintiff's house almost uninhabitable, and almost totally destroyed its value, greatly inconveniencing and endangering the health of plaintiff and his family.

I. The fourth paragraph of the charge of the court to the jury is as follows: "If you find for plaintiff, then you will proceed to assess and determine from the evidence the amount of damages he is entitled to recover in this action; the measure of which will be the loss or

1. INSTRUCTIONS:
whole charge
to be consid-
ered.

Shively v. The Cedar Rapids, I. F. & N. W. Ry. Co.

diminution of the fair rental value of the property in question from the time you find said nuisance was established, up to the commencement of this suit, and find for the plaintiff in such sum." Appellants complain of this portion of the charge, on the ground that it assumes that the stock-yards were in fact a nuisance, instead of leaving the question of their character to the determination of the jury. There would be ground for this complaint did not the preceding portions of the charge properly instruct the jury as to what would constitute a nuisance, and direct them to find for the defendants if a nuisance had not been proven. Taking the charge as a whole, we do not think the jury could have been misled by the paragraph under consideration.

II. The appellants insist that the paragraph of the charge quoted did not properly instruct the jury as to the measure of plaintiff's damages. The alleged nuisance is not necessarily a permanent one, but may be abated at any time by the defendants. Plaintiff would not have been entitled to recover the full value of his property even though he had shown that it was valueless while the nuisance existed, because it might prove to be but temporary, hence the depreciation in rental value, under the facts in this case, was the proper measure of plaintiff's recovery. *Loughran v. City of Des Moines*, 72 Iowa, 382. We think the relief granted was within the prayer of the petition.

III. After the evidence was submitted, the defendants asked the court to instruct the jury to return a verdict for the defendants. This was refused. Appellants insist that this ruling was erroneous, for the reason that the yards were necessary to the operation of defendants' roads, and the odors of which plaintiff complains could not be prevented, but were necessary, even where the yards were properly conducted. The case of *Dunsmore v. Cent. Iowa Ry. Co.*, 72 Iowa, 182, is relied upon as sustaining this position. We do not think that is a case in point. In that case no complaint

2. NUISANCE:
temporary:
measure of
damages.

3. — : dam-
ages: stock-
yards near
dwelling: ne-
cessity of
railroad.

Mills v. Penny.

was made that the alleged nuisance was improperly operated, nor that it was injurious to health. It was held that the noise, stench and dust of which complaint was made necessarily attended the proper operation of the road, and that no recovery could be had for the annoyance they occasioned. In this case the odors complained of are not merely an annoyance, but they are unwholesome, threatening the health of the plaintiff and his family. It is not shown that they are unavoidable, nor does it appear that the yards might not have been located at another place where they would have met the necessities of the road and its patrons. As bearing upon this question, see *Shiras v. Olinger*, 50 Iowa, 571; *Cook v. Benson*, 62 Iowa, 170; *Bushnell v. Robeson*, 62 Iowa, 541; *Baker v. Bohannan*, 69 Iowa, 62.

We discover no prejudicial error in any of the matters discussed by counsel for appellants.

AFFIRMED.

74	172
78	434

74	172
80	334

74	172
85	401

74	172
105	521

74	172
114	698

MILLS V. PENNY.

1. **Adverse Possession : WHAT IS NOT.** Possession by plaintiff of a disputed strip of land taken and held for fifteen years in the belief that it was a part of the quarter-section owned by him, and with no intention of claiming any land beyond his own quarter-section, was not adverse possession, so as to give him title under the statute of limitations to any land not embraced in his quarter-section. (Compare *Grube v. Wells*, 34 Iowa, 148, and *Skinner v. Crawford*, 54 Iowa, 119.)
2. **Boundaries : EVIDENCE AS TO CORNERS : NEW SURVEY.** Positive and uncontradicted testimony of competent witnesses as to the location of original government corners, as seen by them, will prevail over the location of such corners as found by a re-survey.

Appeal from Buchanan District Court.

FILED, MARCH 10, 1888.

ACTION in equity to quiet title to real estate. Judgment for plaintiff, and defendant appeals.

Woodward & Cook, for appellant.

Blair & Dunham and *W. H. Norris*, for appellee.

Mills v. Penny.

REED, J.—Plaintiff is the owner of the southeast quarter, and defendant of the northeast quarter, of section twenty-seven, township eighty-nine, range seven. A former owner of the southeast quarter planted a willow hedge on what he claimed was the line between the two tracts. Defendant claims that the true line is forty-three and one-half links south of that hedge, and the property in dispute is the strip of ground lying between the hedge and the line as defendant claims it to be. Plaintiff claims (1) that the hedge is on the true line; and (2) that he, and those under whom he claims, have been in open, actual and adverse possession of the disputed strip for more than fifteen years, and that consequently his title is established by prescription. With reference to the latter claim, we deem it sufficient to say that the evidence is that possession was taken and held in the belief that the disputed strip was part of the southeast quarter, and without any intention of claiming any part of the other quarter-section; so that if, as matter of fact, the strip was part of the northeast quarter, the possession would not, under the former rulings of this court, be regarded as adverse, and consequently the statute of limitations could not apply. *Grube v. Wells*, 34 Iowa, 148; *Skinner v. Crawford*, 54 Iowa, 119. We think, however, that a fair preponderance of the evidence shows that the hedge is on the true line.

1. ADVERSE possession: what is not.

2. BOUNDARIES: evidence as to corners: new survey.

The person who planted it, and who owned the southeast quarter when it was planted, testified that at that time the quarter-section corners on both the east and west lines of the section were standing, and that he staked the line between them, and planted the hedge on that line. He is corroborated by another witness, who has lived in the neighborhood for many years, and who testified that he saw the mound and stake at the east end of the hedge several years after the hedge was planted. These witnesses are not contradicted by any direct testimony. The defendant relies on the fact that the east end of the hedge, as

 Irwin v. Yeager.

shown by a recent survey, is forty chains and forty-three and one-half links north of the southeast corner of the section. But that does not prove that the quarter-section corner was not originally located at the point where the witnesses say they saw it. If the original survey of the land had been absolutely accurate, the line between the southeast corner of the section and the quarter-section corner would have been just forty chains in length. But the common observation is that the lines are seldom found upon a re-survey to be of the exact length required by the instructions under which the original survey was made, or as shown by the field notes. The apparent discrepancy in this case is not so great as even to raise a suspicion of fraud on the part of the land-owner who would be benefited by it. It may have occurred in the original survey, and the work have been done in a reasonably careful manner.

The judgment, we think, is fully sustained by the evidence.

AFFIRMED.

 IRWIN V. YEAGER *et al.*

1. **Appeal : PRACTICE : PLEADING : OBJECTIONS NOT RAISED BELOW.** A motion to strike out a division of a plea on the ground that it is irrelevant and immaterial, and which is erroneously sustained on that ground in the lower court, cannot be sustained in this court on another ground ; *e. g.*, that it does not state a cause of action.
2. **Highway : OBSTRUCTION : PASSAGE ON ADJACENT LAND : ASSAULT : SELF-DEFENSE.** When a highway is obstructed, the traveler has the right, in order to pass around the obstruction, to go upon adjacent land belonging to a private owner ; and when such owner, in order to prevent the exercise of such right, makes an assault upon the traveler, the latter may defend himself from such assault, and may plead the facts in an action against him by the owner for assault and battery made in such self-defense.
3. **Assault and Battery : EVIDENCE OF MALICE : OLD THREATS.** In an action for assault and battery, evidence that one of the defendants had, two years before, in the anger of a lawsuit, said to the plaintiff, "Never mind ; I will fix you yet," was erroneously admitted to prove malice in the alleged assault, which had no relation to that suit.

74	174
91	586

74	174
el40	606

Irwin v. Yeager.

4. ——— : **EXEMPLARY DAMAGES : NO MALICE.** In an action for assault and battery, exemplary damages cannot be allowed unless the assault is found by the jury to be malicious.

Appeal from Jackson District Court.—HON. WALTER I. HAYES, Judge.

FILED, MARCH 10, 1888.

ACTION to recover damages for an assault and battery. Trial by jury, verdict and judgment for the plaintiff against two of the defendants, and they appeal. There was a verdict for the other defendant.

S. S. Simpson and William Graham, for appellants.

L. A. Wyncoop and Ellis & McCoy, for appellee.

SEEVERS, C. J.—The defendants jointly pleaded a general denial, and that the plaintiff assaulted them, and that they simply defended themselves, as they lawfully might do. The defendant Yeager separately pleaded that he was lawfully passing along a highway adjoining or passing over the property of the plaintiff, and while upon the highway the plaintiff made an assault upon the defendant, and thereupon the defendant defended himself, as he lawfully might, doing no further injury to the plaintiff than was necessary. The other appellant pleaded the same defense in the same form and manner. The defendants also jointly pleaded in the sixth division of the answer that the same highway passing through the lands of the plaintiff had become foundrous and utterly impassable for a considerable distance by reason of a heavy fall of snow, and, therefore, it was absolutely necessary for persons passing along said highway to pass over the lands of the plaintiff adjoining or abutting on the highway; that the defendants attempted to do so, when they were assaulted by the plaintiff, and thereupon defended themselves, as they lawfully might do. The plaintiff filed a motion to strike out the sixth division of the answer, on the ground that the matters pleaded were immaterial and irrelevant. This motion

 Irwin v. Yeager.

was sustained. The defendants offered evidence tending to prove that the highway was impassable and had suddenly become so. This evidence was rejected. The court instructed the jury as follows :

“1. The right of a traveler upon the public highway to go upon the adjoining lands in case the highway is obstructed is a public right, which was taken into consideration at the time of the establishment of the highway, and for the exercise of which right on the part of the public the owner of the adjoining land has received compensation ; and such traveler may, no objection being made by the owner or occupant, lawfully enter upon such adjoining lands, in case the highway becomes impassable by recent obstructions, and open the fence and inclosures, if necessary, and pass around such obstruction, doing no damage to the adjoining premises or the crops growing thereon, or the fences, beyond such as is necessary to enable him to pass.”

“6. No question is made but that the plaintiff was the owner and in possession of the land on or adjoining which the affray took place, and, being so, he had the right to stop the defendants from going thereon, and to use such force as was necessary to that end, but legally no more, and if he intentionally used more force or a greater degree of violence than was necessary to that end, he would be guilty of an assault himself, and the defendants would themselves have the right of self-defense, although they might have commenced the affray in the first instance.”

I. It is provided by statute that in an action brought for an injury to a “person, character or property, the defendant may set forth, in a distinct division of his answer, any facts of which evidence is legally admissible to mitigate or otherwise reduce the damages, whether a complete defense or justification is pleaded or not ; and he may give in evidence the mitigating circumstances, whether he prove the defense or justification or not. * * *” Code, sec. 2682. Counsel for the appellee insist that the court correctly struck out

1. APPEAL:
practice:
pleading:
objections
not raised
below.

 Irwin v. Yeager.

the sixth division of the answer, upon two grounds: the *first* being that, if it be regarded as pleading mitigating circumstances only, then it was essential that it should confess the battery; and, *secondly*, that the matters pleaded do not constitute a defense to the action. But neither of these grounds was urged in the district court, and, therefore, cannot be presented here for the first time. That the matters pleaded were immaterial and redundant is essentially different from a claim that a cause of action is not stated, or that the cause of action was not confessed. If a cause of action is not stated in a pleading, the party should demur. This motion cannot be treated as a demurrer, and, if it could, it should be disregarded because not sufficiently specific.

II. It will, however, be conceded, for the purpose of this opinion, that, if the division struck out does not present a complete or a partial defense to the action, then the error of the court in striking it out was not prejudicial. The material question is whether the fact that the highway was impassable constituted any defense to this action, and we have to say we think it does. Such has been the well-settled common-law rule in England for many years. Ang. & D. Highw., sec. 353. Highways are established for the use and benefit of the public, and when they are rendered temporarily impassable the right of travel should not be interrupted. This right is based on the ground of inevitable necessity; and also where the public convenience and necessity come in conflict with private right, the latter must yield to the former. Such fact, therefore, may be pleaded and shown as an excuse for the alleged trespass. Such temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject. The leading case on this subject in this country is *Campbell v. Race*, 7 Cush. 408, 54 Am. Dec. 731. See, also, *Morey v. Fitzgerald*, 56 Vt. 487. These cases sustain the views above expressed. The court, therefore, erred in

The Equitable Life Ins. Co. v. Bd. of Equalization of Des Moines.

striking out the sixth division of the answer, and in rejecting evidence tending to sustain the matters therein pleaded, and also in giving the instructions above set out.

III. Evidence was introduced tending to show that more than two years prior to the transaction in question, when the plaintiff and one of the defendants had a lawsuit, the latter, in speaking about it to the former, said: "Never mind; I will fix you yet." This evidence was objected to, but the objection was overruled. The evidence, it may be supposed, was admitted on the theory that it tended to show malice, but the remarks were made long prior to the transaction, and the latter does not appear to have grown out of, or had any connection with, the lawsuit, and, therefore, we do not think such evidence had any tendency to show that defendant was actuated by malice in what he did. The evidence, therefore, was erroneously admitted. The instructions in relation to exemplary damages are erroneous, because the jury were not required to find the assault was malicious.

REVERSED.

THE EQUITABLE LIFE INSURANCE COMPANY V. THE
BOARD OF EQUALIZATION OF THE CITY
OF DES MOINES.

Life Insurance Company : TAXATION OF MONEYS AND CREDITS : WHAT TO BE DEDUCTED AS INDEBTEDNESS. So much of the assets of a life insurance company as consists of securities for loans, notes taken for premiums, municipal bonds and warrants, and cash and cash items, is taxable as money and credits; but, in listing such money and credits for taxation, the debts of the company should be deducted; and among such debts are (1) the debt of the company to its stockholders,—being the amount which the stockholders would be entitled to receive upon a present distribution of the money and credits of the corporation; and (2) the amount which it owes to its policy-holders, and that is equal to and represented by the reserve fund which the statutes of the state require to be kept. Accordingly, where, as in this case, the amount of such debts exceeds the amount of money and credits, the company is not taxable at all on account of money and credits.

74	178
86	36
74	178
96	244
98	738

The Equitable Life Ins. Co. v. Bd. of Equalization of Des Moines.

Appeal from Polk Circuit Court.

FILED, MARCH 10, 1888.

THE proper assessor of the city of Des Moines assessed plaintiff for the year 1885 on moneys and credits in the sum of two hundred and forty-six thousand dollars, and, on appeal by the plaintiff, the board of equalization reduced this assessment to fifty thousand dollars. From this action both appeal. The plaintiff, first perfecting its appeal, is designated as appellant.

St. John & Whisenand, J. S. Polk and George G. Wright, for appellant.

J. H. Detrick, Baylies & Baylies and Hugh Brennan, for appellee.

BECK, J.—I. An opinion was at a former term filed in this case, affirming the judgment on plaintiff's appeal and reversing it on defendant's. A petition for rehearing was filed by plaintiff, and the cause was again submitted on oral and printed arguments of the counsel of the respective parties. These arguments were exhaustive and protracted, exhibiting marked ability on the part of counsel. We will be permitted to say that the very character of the arguments discussing the case, which we have indicated, led counsel to the consideration of many doctrines collateral to those involved in this case, and the consideration of decisions of other cases similar to this only in the fact that they involve questions pertaining to taxation. The extended discussion of these collateral questions served only to confuse and lead the mind away from the controlling questions of this case. In this regard the able and exhaustive argument of counsel imposed a burden upon us under which we stumbled. Judicial experience demonstrates that in the consideration of legal questions the mind is more surely led to correct conclusions when guided in the path marked out by the real questions in controversy, than when it is conducted into

The Equitable Life Ins. Co. v. Bd. of Equalization of Des Moines.

by-paths of collateral matters. These remarks are not intended as a reproof to counsel or as a justification of ourselves, but as suggestions intended to direct attention to a matter of interest to the profession.

II. The circuit court found that the plaintiff, a life insurance company organized under the laws of this state, had assets, consisting of securities for loans, notes taken for premiums, municipal bonds and warrants, cash and cash items, of the value of \$485,314. We think this is correct; approximately correct at least. It is not important that we determine the amount with greater accuracy, in view of the conclusion we reach as to the legal questions. Any possible difference between this and the true amount of the assets would not lead to a different judgment in this case. It may be here remarked that no question arises as to assessments upon real estate or property, other than money and credits owned by plaintiff, which is taxed separately from the assets above enumerated.

III. We are now to inquire to what class these assets belong. When considered as the subject of taxation, all property, personal and real, is subject to be listed for purposes of taxation, except such as is specifically exempted by statute. Code, sec. 823. The assets in question are personal property, and are not specifically exempted from taxation. They are subject to taxation as belonging to the class of moneys and credits. Code, secs. 801, 802. This is not disputed.

IV. Code, section 814, provides that, "in making up the amount of money or credits which any person is required to list or have listed and assessed, he will be entitled to deduct from the gross amount all debts in good faith owing by him. * * *" We will now inquire whether these assets of plaintiff, taxable as moneys and credits, are subject to diminution, when listed, by deducting therefrom *bona-fide* debts shown to be owed by plaintiff. We must first determine what is meant by the word "debt." Webster defines it as "that which is due from one person to another,

The Equitable Life Ins. Co. v. Bd. of Equalization of Des Moines.

whether money, goods or services ; that which one person is bound to pay to another, or to perform for his benefit ; that of which payment is liable to be exacted ; due ; obligation ; liability." Blackstone (bk. 3, p. 154) defines the word as meaning "a sum of money due by certain and express agreement ; as, a bond for a determinate sum ; a bill or note ; a special bargain." Bouvier says that in an enlarged sense "it denotes any kind of just demand." The word "due", used in these definitions and elsewhere, means "owed", and not payable *eo instanti*, but payable now or hereafter. Does plaintiff owe debts which the law requires to be deducted from its money and credits in listing the same for taxation ? Before replying to this question, we must consider the character of the plaintiff, and the duties and obligations it owes to others. It is a corporation, an artificial person created to discharge specified functions, and perform and discharge specific duties and obligations. It is created to hold and acquire money and property for the profit and advantage of its stockholders. Such property it holds as a trustee ; the *cestuis qui trust* being its stockholders. The legal title of all property belonging to the corporation is in it. The equitable interest, the right to the profits and acquisition of the property, belongs to the stockholders. When they pay in their money on the capital of the corporation, they part with the title to the money, and receive in its place a claim as *cestuis qui trust* upon the corporation for all profits made by it in managing the capital, and the right to have returned when the corporation is wound up the money paid in by them as its capital. Precisely the same rights arise in the case of profits in the use of the capital by the corporation, or acquisitions to its property from any other source. This right and claim of the stockholders is a property right ; is certain and determinate. The value of the right may be contingent and uncertain, but it is none the less a right to receive money from the corporation. Here is a claim by the stockholders for which the corporation is liable. It is not now mature, but will

The Equitable Life Ins. Co. v. Bd. of Equalization of Des Moines.

become payable in the future. The amount which the stockholders will receive may not now be certainly determined. What they would receive were the claim now payable could be accurately determined. The corporation being bound to pay the stockholders, its obligation so to do creates a debt according to the definitions above given. It should, therefore, be deducted from the amount of the money and credits in listing the same for taxation. It will be readily seen that these views apply equally to payments made by the stockholder and money received by the corporation from other sources. In each the stockholder has the same interest, and the corporation is bound to pay him on account of each. It will also be readily seen that these rules would prevail in the case of money in the hands of a trustee, in the absence of the statute to the contrary. But Code, section 803, provides that a trustee shall list for the beneficiary the trust property held by him.

V. Code, sections 813, 821, paragraph two, provide for the taxation of stock of a corporation to the stockholders, being assessed at its cash value. Under these provisions the stockholder pays taxes upon his interest in the corporation property, for of course the value of the stock will be fixed by the property held by the corporation. This surely is the case so far as money is concerned. If the plaintiff has a large surplus of money on hand, it of course affects the value of its stock. It will be discovered that upon these considerations the interest of the stockholders in the property of the corporation is taxed through the stock which represents that interest. It may be said that the property of the corporation may escape equal taxation if the law be as we have stated. Not so if the law can be properly administered. But if this objection be well founded on fact, the courts cannot refuse to enforce the statutes according to their plain provisions. The law is so written, and must be obeyed. Equal taxation should prevail, and to attain that end courts should labor, but not by misinterpretation of statutes. Absolutely equal

The Equitable Life Ins. Co. v. Bd. of Equalization of Des Moines.

taxation is not attainable. The best the law can do is to approximate to it. There is no ground to hold that our conclusions will fail to secure approximately equal taxation, so far as moneys and credits of corporations are concerned. It will be understood that these views do not apply to real estate and other property for which taxation is specifically provided, but extends only to money and credits of corporations. They are in harmony with prior decisions of this court. See *Hubbard v. Supervisors of Johnson County*, 23 Iowa, 130; *Morseman v. Yunkin*, 27 Iowa, 353; *Des Moines Water Co.'s Appeal*, 48 Iowa, 324; *Cook v. City of Burlington*, 59 Iowa, 251.

VI. It may be here remarked that the plaintiff held what is called a surplus, the amount of which does not clearly appear. It is not important that the precise amount should be determined. Whatever it be, it goes to increase the value of the stock, and is reached through the stock for taxation. Our conclusion is that the amount owing the stockholders, in the sense of the expression which accords with what we have said,—that is, the amount which the stockholders would be entitled to receive upon a present distribution of the money and credits of the corporation—should be deducted from such moneys and credits in listing them for taxation.

VII. The policies issued by plaintiff upon the lives of their customers have a fixed value, which may be determined by rules recognized in the business of life insurance. Each policy-holder has a claim upon the plaintiff for the value of his policy. It may be a claim dependent upon the continuation of the life of the policy. The policies issued by plaintiff are not forfeited by failure to pay the annual premiums, after two payments, but a paid-up policy is issued for an amount fixed by the terms of the policy. It will be discovered from this statement that the company's liability is not contingent, but as certain as that the assured will die. We need not inquire as to the extent of that liability. It is fixed by what is called the reserved fund required

Warfield v. Warfield.

to be kept by the statutes of the state. Code, sec. 1169. The amount of the reserved fund is determined under the provisions of this section and rules prevailing in the business of life insurance. We need not inquire as to the amount of this fund held by plaintiff. We do not understand that there is any dispute in regard thereto. It is plain that the legislature enacted this statute to secure to the policy-holders the performance of the obligation to pay the amount secured by the policy. This statute, therefore, recognizes the existence of a debt from the company to the policy-holders, and provides for securing its payment through this reserved fund. To us it seems plain that the plaintiff is indebted to each of its policy-holders, and the aggregate amount of such indebtedness equals this reserved fund, which should be deducted from plaintiff's money and credits in listing the same for taxation. In support of our views, see *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 499. Numerous cases cited by counsel on both sides, in our opinion, are not applicable to this case, being fire insurance cases, or decided under statutes unlike our own. The amount of plaintiff's indebtedness to its stockholders and policy-holders exceeds the amounts of its moneys and credits.

We have given the case protracted and careful consideration, and reach the satisfactory conclusion that plaintiff is not subject at all to be taxed upon its money and credits, as they are more than balanced by its debts. The judgment of the circuit court on plaintiff's appeal is reversed. On defendant's appeal it is

AFFIRMED.

WARFIELD V. WARFIELD.

1. **Appeal : FINDING OF COURT : EVIDENCE TO SUPPORT.** The finding of the trial court, in an ordinary action, upon a question of fact has the force and effect of the verdict of a jury, and cannot be set aside on appeal if there is evidence upon which, fairly considered, it can be sustained.

Warfield v. Warfield.

2. **Guardian : REPORT OF : CONCLUSIVENESS.** The report of a guardian, when approved by the court, must be regarded as at least *prima facie* correct, casting on him who assails it the burden of proof to show error. (See *Latham v. Myers*, 57 Iowa, 519 : *Brewer v. Stoddard*, 49 Iowa, 279.
3. ——— : **REPORTS ASSAILED : ATTORNEY FEE FOR DEFENSE.** An allowance made in this case to the guardian of an insane ward, for an attorney fee in defending her reports when assailed as being fraudulent and unjust, is approved.

Appeal from Muscatine Circuit Court.

FILED, MARCH 10, 1888.

THE facts are stated in the opinion.

L. A. Ellis and Cloud & Doran, for appellant.

J. Carskaddon and Boal & Jackson, for appellee.

SEEVERS, C. J.—The plaintiff and defendant were married in September, 1875, and thereafter resided on a farm near Muscatine, until July, 1876, when the defendant returned to her father's home at Iowa City, where she was taken sick, and did not return to her home near Muscatine until September, 1876. Prior to this last period, as we understand, the plaintiff had been adjudged to be insane, and sent to the hospital at Mt. Pleasant, where he remained until 1883, when he returned to Muscatine. The marriage was judicially annulled in 1882. The plaintiff must be regarded as sane. It was so judicially determined in this proceeding. In 1876 the defendant was appointed guardian of the estate of the plaintiff. Within a day or two of her appointment there was an appraisement of the property belonging to the estate. The value thereof was fixed by the appraisers at nearly thirty-five hundred dollars. In May, 1877, and 1878, October, 1879, and in June, 1880, she made reports of the disposition of the property of the estate, and of her receipts and expenses. The reports were approved by the circuit court when they were made. In August, 1884, the plaintiff filed a petition in the circuit court, in which it was alleged that such

 Warfield v. Warfield.

reports were fraudulent, untrue and false. Specifications were made of acts and misconduct of the defendant on which such charge was based. In February, 1885, the defendant made an additional report, attached to which is a list of property belonging to the plaintiff, which she states he may have at any time. Evidence was introduced by both parties bearing on the question whether the defendant had faithfully and properly administered the estate, and the court found—(1) “that the charge of fraud made against the guardian is not sustained; (2) that there were mistakes made by the guardian in her reports, and that she should be charged with one hundred and fifty-three dollars more than she had charged herself; (3) that the guardian was not entitled to compensation, because she had the use of certain horses belonging to the estate, for which she had not accounted, and that such use was a sufficient compensation; (4) there was allowed the defendant fifty dollars as attorney’s fees in this proceeding; and (5) there was a balance found due the plaintiff amounting to \$266.33.” It was further found that defendant had possession of certain property belonging to the plaintiff; and the “question of the discharge of the guardian, and the delivery of the property held by the guardian to the ward, is left for determination in the future progress of the guardianship proceedings.”

I. The finding of the court has the force and effect of a verdict of a jury, and such finding cannot be set aside if there is evidence, fairly considered, on which it can be sustained. Counsel for the plaintiff insist that the court erred in finding that the charge of fraud was not sustained; and it is said that the court held that, as the reports made by the guardian had been approved by the court, the statements therein could not be controverted. Whether the court so held is regarded as doubtful; but, conceding it to be so, and that the holding is erroneous, it at most was error without prejudice, in so far as the fraud is concerned. There is no evidence, in our judgment, tending to show any fraudulent acts or conduct on the

1. APPEAL: finding of court: evidence to support.

Warfield v. Warfield.

part of the defendant. She made her reports from time to time, and the same were approved by the court. There is no pretense that the court was in any respect deceived or imposed upon. The reports are full, complete and explicit, and no attempt at concealment appears on the face thereof, or is made apparent by the evidence introduced. It will be conceded that mistakes therein and omissions therefrom do appear; but that such mistakes and omissions were made with any wrongful design or purpose does not appear. The appraisement was made by the brothers and brother-in-law of the plaintiff, and there is evidence tending to show that defendant acted under their advice to at least a considerable extent. It is true, the evidence is conflicting upon this point, but the evidence is such that we would not be justified in disturbing the finding of the court. We concur in the proposition that the charge of fraud has not been sustained.

II. Counsel for plaintiff, with much force and vigor, contend that the finding of the court that the defendant had properly administered the

THE SAME.

estate, except as the court found otherwise, is not sustained by the evidence. Here we are next met with the difficulty that this case is not triable *de novo* in this court. The evidence is conflicting as to the specific matters wherein it is alleged the defendant has failed to account for all the property that came into her hands. There is evidence upon which the finding of the court can be well and fairly sustained. We desire also to say

that the reports, approved as they were by the court, must be regarded as at least *prima facie* correct, entitling the defendant to the credits appearing in them. *Latham v. Myers*, 57 Iowa, 519; *Brewer v. Sloddard*, 49 Iowa, 279.

We do not deem it necessary to set out the evidence, for the reason that we think counsel will concede there is evidence tending to support the finding of the court; and under the settled practice we cannot disturb the finding in an action or special proceeding which does not pertain to the domain of equity.

² GUARDIAN :
report of: con-
clusiveness.

Reed v. The Chicago, St. P., M. & O. Ry. Co.

Complaint is made that the court allowed the defendant compensation for the services of her attorney.

8. —: reports We deem it sufficient to say we do not
assailed: feel disposed to interfere with the order of
attorney fee the court in this respect.
for defense.

AFFIRMED.

REED V. THE CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILWAY COMPANY.

1. **Railroads : NEGLIGENCE : CROSSING HIGHWAY WITHOUT RINGING BELL.** Under chapter 104, Laws of 1884, to run a locomotive across a public highway without ringing the bell is negligence, for which the railroad company is liable.
2. — : — : — : **QUESTION FOR JURY.** Plaintiff was struck by a locomotive and injured, while driving across a railway track on a public highway. Upon the question whether the bell of the locomotive was rung or not, plaintiff testified positively that it was not ; that he looked and listened while approaching the track, and that the habits of his horses were such that they would not have gone upon the track had the bell been rung. Other witnesses who were in the vicinity, and some of whom heard the crash of the collision, and one of whom had his attention directed to plaintiff's danger, testified that they did not hear it. But the engineer and fireman, and another employe of defendant who was on the train, testified positively that it was rung. *Held* that there was such a conflict of the evidence as to preclude this court from interfering with the finding of the jury that the bell was not rung.
3. — : **NEGLIGENCE : OBSTRUCTING STREET WITH CARS : INJURY TO TRAVELER ON CROSSING.** Plaintiff was struck by a locomotive and injured, while driving across defendant's track on the street of a city. On a side-track, which crossed the street, a line of box-cars was stored, and had been for some days, so that they obstructed the street, except an opening of about thirty-five feet, which was left for public travel. *Held* that to so obstruct the street was negligence ; that if the whole width of the street was not required on which to drive vehicles, it was necessary that it should be left open, so that travelers approaching the crossing would have an unobstructed view of, at least, the full width of the street.
4. — : **INJURY TO TRAVELER ON CROSSING : CONTRIBUTORY NEGLIGENCE : EVIDENCE.** The evidence in this case considered (see opinion), and *held* that it cannot be concluded therefrom, as matter of law, that plaintiff was guilty of contributory negligence in driving upon defendant's track as he did.

74	188
84	445
74	188
85	684
74	188
88	409
88	417
74	188
91	186
74	188
92	626
74	188
94	265
74	188
116	554
74	188
120	115

Reed v. The Chicago, St. P., M. & O. Ry. Co.

5. ——— : ——— : DUTY OF TRAVELER TO STOP VEHICLE. It is not necessarily the duty of a traveler about to cross a railway track upon a highway to stop his team. He is only required to exercise such care and caution as a reasonable person of ordinary prudence and skill would exercise under the same or similar circumstances.
6. ——— : ——— : AMOUNT OF DAMAGES. The plaintiff in this case was a farmer sixty-five years old, and he was so injured through defendant's negligence that several of his ribs were broken in such a manner that they punctured his lung. Six months afterward he could not raise his left arm above his head, and the injuries seem to be permanent in their nature. *Held* that a verdict of eighty-two hundred and fifty dollars could not be interfered with on appeal as being excessive.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, MARCH 10, 1888.

THIS is an action to recover damages for a personal injury which the plaintiff sustained by a collision between a train of cars of appellant and a wagon of the plaintiff at the crossing of Dace and Howard streets, in Sioux City. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

J. H. & C. M. Swan, for appellants.

Hubbard, Taylor & Spaulding, for appellee.

ROTHROCK, J.—I. The plaintiff resides some ten miles from Sioux City. On the fifth day of September, 1884, he went from his home to said city alone in a lumber wagon, and, after transacting his business, he started for his home, leaving the city by way of Dace street. The defendant's railroad track and a side-track are laid upon Howard street, which crosses Dace street at right angles. In attempting to cross Howard street, the wagon of plaintiff, in which he was seated, was struck by a switch-engine, and the plaintiff was thrown from the wagon and very seriously injured. He grounds his action to recover upon three alleged acts of negligence upon the part of the defendant: (1) Because the trainmen operating the engine failed to give proper signals

 Reed v. The Chicago, St. P., M. & O. Ry. Co.

in approaching the crossing; (2) in so obstructing its track as to shut off the sound and sight of an approaching engine; and (3) in failing to place a flagman at the crossing. The defendant denied the averments of negligence, and alleged that the plaintiff was justly chargeable with negligence which contributed to cause the injury of which he complains.

The first question which we think should be determined is that of the alleged failure to give any signal of the approach of the engine. It appears that there is a city ordinance which prohibits the blowing of locomotive whistles within the city. But the plaintiff claims that the engine approached the crossing and collided with his wagon without the ringing of the bell upon the engine. If this be true, there can be no

1. RAILROADS:
negligence:
crossing high-
way without
ringing bell.

question but that it was negligence for which the defendant would be liable, unless exonerated from liability by reason of some negligence of the plaintiff. By chapter 104 of the Laws of 1884, it is required that the bell on a locomotive engine shall be rung at the approach of a highway crossing, and it shall be kept ringing continuously until the crossing is passed, and that the company shall be liable for all damages which may be sustained by any person by reason of a neglect to do so. It is a disputed question in the case whether the bell was rung at the approach to the crossing. The plaintiff testified positively that it

2. —:—:
—: question
for jury.

was not; that the engine approached silently and that if the bell had been rung he could have heard it. Several other witnesses who were in the immediate vicinity testified that they did not hear the bell. Now, it is true this is negative testimony, for the bell might have sounded and the persons in the vicinity have failed to hear it, or, by reason of being accustomed to the passing of trains, have failed to notice it; but some of these witnesses heard the crash of the collision, and one, at least, had his attention directed to the plaintiff's danger, and did not hear the bell. We think this evidence is not to be discarded in considering this question. Another circumstance related by plaintiff is

 Reed v. The Chicago, St. P., M. & O. Ry. Co.

entitled to consideration. He stated that his team would not have gone on the crossing if the bell had been ringing. He knew the instincts and habits of his horses, whether liable to fright at the ringing of a bell upon an engine. Opposed to this evidence, the engineer and fireman, and another employe of defendant who was on top of one of the cars attached to the engine, testified positively that the bell was rung as the crossing was approached. In this state of the evidence, it was a fair question for the jury to determine. It is not the province of this court to say that the bell was rung.

II. We come now to the question of the alleged negligence of defendant in blocking up and obstructing the view of its track at the crossing. As has been said, there are two railroad tracks on Howard street. The main track is a line connecting the yards of the defendant with its transfer boat across the Missouri river.

3. — : negligence : obstructing street with cars : injury to traveler on crossing.

The tracks at the crossing of Dace street are twelve feet apart from center to center. As the plaintiff approached the crossing, the first track was the side-track. A line of box-cars was stored on this track along Howard street for a considerable distance. There was an opening in this line of cars to permit travel to pass along Dace street. The ground at the crossing is practically level ; the railroad tracks being laid upon the surface. This opening in the line of cars was not to exceed thirty-five feet wide. There was an absolute and impassable obstruction of more than half the width of Dace street, so that foot travel was compelled to go off the sidewalk and around the end of a car on one side of the street. The line of cars had been left in this position for several days, and during this time the defendant was using its main track from the yards to the transfer. It is claimed that there was no showing that the opening was not sufficiently wide to properly accommodate the travel on Dace street, and that for aught that appears the defendant had the right to store its cars on Howard street. We think the bare statement of the manner in which Dace street was obstructed is a

 Reed v. The Chicago, St. P., M. & O. Ry. Co.

sufficient answer to this position. Whatever the abstract right may be,—that is, whether the defendant was liable to prosecution for obstructing Dace street,—it was nevertheless a plain violation of its duty to the public to so use the street. If the whole width of the street was not required upon which to drive vehicles, it was necessary that it should be left open so that travelers approaching the crossing would have an unobstructed view of at least the full width of the street.

The plaintiff, in his testimony as a witness upon the trial, gave the following statement of the facts

4. —: Injury to
traveler on
crossing: con-
tributory neg-
ligence: evi-
dence.

leading up to and immediately attending the collision: “As I approached the railroad tracks I saw there was box-cars on the side-track and pretty close together. I

should judge they were not over twenty or twenty-five feet apart. I did not notice in particular on which side of Dace street the cars projected most. I know it was a narrow place to go through. I thought of that before I got to it,—yes, I thought of that before I got to it. When I got near the crossing, within probably one hundred and fifty or two hundred feet, I held my team up and listened as intently as I could, and raised myself up and looked, and was driving very slow and continued in that way until I got onto the track. My horses got onto the track, and then was the time I could not drive slow. My horses sheered to the right. That is the last I recollect anything about it, only I got far enough along to see this engine right here almost onto me. I first saw the engine just as the horses made the jump sideways; it was almost onto me. I first saw it as I came out from behind the car that was to the north on the side-track. I did not hear any sound or signal. I looked from the time I got within one hundred and fifty or two hundred feet of it. I did not take my eyes off; looked first one way and then the other, and I saw or heard nothing.” He made these further statements in his cross-examination: “I say that if the bell had been ringing on that engine with the wind blowing from the direction it was, and with the obstructions that were

Reed v. The Chicago, St. P., M. & O. Ry. Co.

between me and the engine, I should have heard it. I should certainly have heard it at the time I drove across the tracks. The engine was right onto me. The bell did not ring, and I can't drive my team across the track where the bell is rung. I say it was not rung at the time I drove upon the track. I first saw the engine as I came round the end of the cars. It was right onto me at that time." We have made these extracts from the plaintiff's testimony for the reason that, so far as they relate to his manner of driving his team, and his efforts to discover the approach of a train, they are not directly contradicted by any witness. One of the witnesses, who saw him as he approached the crossing, stated that he was driving leisurely along. The main defense was that the plaintiff could have seen the smoke-stack of the engine by looking over the cars, and that he could have seen the train approaching by looking under the cars. Photographic views were taken after the accident from a point in Dace street, over which plaintiff passed, which it is claimed demonstrates this to be true. If it be true, the testimony of the plaintiff, that he looked and listened as he approached, must be entirely disbelieved, for surely no sane man would have driven between the opening in the street, knowing that he was to come in collision with a train. It was not an attempt on his part to recklessly cross the track in front of a moving train, as is sometimes the case. After an examination of these views, and a full and careful consideration of all the evidence, and the arguments of counsel based upon the relative movements of the train and the wagon, and the number of feet the train, going at six miles an hour, as was shown, would move while the wagon was passing over a given distance, we conclude that it cannot be said as matter of law that the plaintiff was chargeable with negligence in not seeing the approaching train. We do not hold that he could have seen it. The train was moving at a much greater rate of speed than the wagon, and as he came nearer to the crossing he would be

 Reed v. The Chicago, St. P., M. & O. Ry. Co.

unable to see the smoke-stack, and looking under the cars at an angle his view would be very much obstructed by the wheels.

The defendant prepared and submitted to the court a number of instructions, with the request that they be given to the jury. Several of these instructions recited facts disclosed in evidence, and laid down the rule that it was the duty of the plaintiff to stop his wagon and look and listen for an approaching train before going upon the crossing. These instructions were refused. But the court embodied much that was requested by the defendant in the charge given to the jury. It refused to direct the jury as matter of law that it was the duty of the plaintiff to stop his wagon before going upon the track. If it had done so, this would have been an end of the case, for the plaintiff did not claim that he brought his team to a full stop. It would have been equivalent to instructing the jury to find for the defendant. We do not believe that the court would have been warranted in so instructing. It would have been a plain invasion of the province of the jury. There were no such conceded or undisputed facts in the case as required the court to hold as matter of law, or to direct the jury, that the plaintiff should have stopped his team. It is probably true that if he had stopped his team he would not have been injured. But that is not the question the jury were required to determine. The question submitted to them was, did the plaintiff, as he approached the crossing, use ordinary care and diligence to ascertain whether a train was approaching? The court instructed the jury upon this feature of the case as follows:

“While it was the plaintiff’s duty, in approaching and being about to cross the tracks, to exercise ordinary care and caution, and to know of the approach of engines or trains, he is not, as a matter of law, bound to stop his team and listen or look for an approaching train or engine before attempting to pass in every case. If he could hear or see as well without stopping, he would not be required to stop to listen or to look. He

5. —: —:
duty to trav-
eler to stop
vehicle.

Reed v. The Chicago, St. P., M. & O. Ry. Co.

is merely bound to do that which is dictated by common prudence, in view of the perils to which he may be exposed. If the obstructions to sight or difficulty of hearing were such that an ordinarily prudent man would not attempt to cross without stopping to see or to listen before crossing, then the failure so to do would be negligence; and if the jury find from the evidence that plaintiff did drive upon the tracks without exercising the care and caution which the facts and circumstances in evidence show it was his duty to exercise, and his failure to exercise such care directly contributed to produce the injury, then he cannot recover. If the jury find, from the evidence, that the cars were standing upon the track in such a manner as to obstruct or partially obstruct the view of the track upon which the collision occurred, and to make it more difficult to hear or see an approaching train, and the plaintiff, knowing these facts, drove upon the track without looking or listening or taking any precaution to ascertain whether the train was coming or not, and a collision occurred by reason thereof, he cannot recover in this action."

We think these instructions, and others given by the court, were correct. All through the charge, the jury are referred to the facts and circumstances disclosed in the evidence, and are directed to determine therefrom whether the plaintiff exercised such care and caution as a reasonable person of ordinary prudence and skill would exercise under the same or similar circumstances. The thought was kept prominently before the jury that it was absolutely necessary that the plaintiff should use his faculties of sight and hearing, and that if he failed in this respect he could not recover. We know of no authority which goes further than this, and we think the court correctly left it to the jury to determine whether the plaintiff should have stopped his wagon.

III. The jury found for the plaintiff in the sum of eighty-two hundred and fifty dollars. It is claimed

The State v. Rainsbarger.

6. — : — :
amount of
damages.

that the verdict is excessive, and the result of passion and prejudice. The plaintiff at the time of the injury was sixty-five years of age. He was a farmer by occupation, and, as we infer, he is the owner of the farm on which he resides. By the collision he was thrown headlong from the wagon, and two or three of his ribs were broken towards the back near the shoulder-blade. The broken ribs punctured his lung, so that air escaped therefrom and inflated the surrounding tissues. He was confined to bed in a hotel in Sioux City for three weeks, when he was removed to his home, where he was confined indoors for about a month. He suffered great pain, and at the time of the trial in the court below, some two years after the injury, he still continued to be a sufferer from his injuries. For six months after the injury he could not raise his left arm above his head. The injuries appear to be permanent in their nature. We are not prepared to say that it is our duty to interfere with the verdict as being excessive.

AFFIRMED.

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THE STATE V. RAINSBARGER.

1. **Criminal Practice : CONTINUANCE : SICKNESS OF DEFENDANT'S COUNSEL : DISCRETION.** A motion by defendant in a criminal case for a continuance, based on the alleged illness of some of his counsel, is addressed to the discretion of the trial court ; and the ruling of such court will not be reversed on appeal, unless it is made to appear that such discretion has been abused, with prejudice to defendant ; and the facts of this case (see opinion) show neither abuse of discretion nor prejudice.
2. — : — : **COUNTER-AFFIDAVITS.** While it is true that an application for a continuance, based on the absence of a witness, may not be resisted by counter-affidavits contradicting the statement of facts which it is alleged the witness will swear to (*State v. Dakin*, 52 Iowa, 395 ; *State v. Scott*, 44 Iowa, 93), the rule is entirely different as to the statement of facts showing diligence, and the like ; and, as to these, counter-affidavits are admissible. (Compare *State v. Wells*, 61 Iowa, 629.)

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81 606
74 196
86 26

74 196
89 118
89 415
74 196
92 457
74 196
97 480
98 103
98 400

74 196
109 99

74 196
117 227

74 196
120 567

74 196
125 504

74 196
135 169

The State v. Rainsbarger.

3. ——— : **KEEPING JURY TOGETHER : DISCRETION OF COURT.** A request, by defendant on a criminal charge, that the jury be placed in the care of officers, and be not permitted to separate, is addressed to the sound discretion of the trial court (Code, sec. 4434; *State v. Felter*, 25 Iowa, 67); and, before the action of the court in refusing such request will be interfered with on appeal, abuse of such discretion must be shown, and prejudice resulting therefrom; which is not done in this case. (See opinion for facts.)
4. ——— : **USING WITNESS NOT NAMED ON INDICTMENT : NOTICE TO DEFENDANT : SUFFICIENCY.** The state was permitted to examine a witness whose name was not indorsed upon the indictment, as required by Code, section 4293, upon showing notice to defendant as required by Code, section 4421; but the notice stated the residence of the witness to be Kansas City, Kan., whereas it proved to be Kansas City, Mo.; and the statement in the notice of what the state expected to prove by the witness varied somewhat from what was actually proved by him. But *held* that this was no ground for reversal, since it does not appear that defendant was in any manner prejudiced by the irregularities. (See Code, sec. 4538.)
5. **Homicide : EVIDENCE : COMPETENT, THOUGH WEAK.** Upon a trial for murder, it was shown that a bottle usually used to contain a certain kind of bitters was found in a buggy, not far from where the body of the deceased was found, and that, when last seen alive, he was riding in the buggy. *Held* that it was competent to prove by a witness that he had, on the evening before, sold defendant a similar bottle containing bitters, as tending to connect defendant with the crime.
6. ——— : ——— : **MOTIVE.** Evidence which tends to show the relations between the defendant and the deceased, and a motive for the homicide with which defendant is charged, is admissible against him; and such was the evidence objected to in this case. (See opinion.)
7. ——— : ——— : **WEAPON IN DEFENDANT'S POSSESSION.** Evidence that defendant had, before the homicide, a pair of "knuckles" was admissible against him, where the wounds upon the decedent were such that they might have been made by such weapons.
8. ——— : ——— : **IDENTIFICATION OF BUGGY BY ITS "RATTLE."** Where, in a case of homicide, the identification of a certain buggy as being that of the deceased was material, *held* that the testimony of a wagon-maker, to the effect that he knew defendant's buggy, and that he knew the one in question to be his by the peculiar rattle of its wheels, was competent.
9. ——— : **EXPERT TESTIMONY : WHAT IS NOT.** In a case of homicide, the defendant, after stating hypothetically the character of the wounds, asked a witness, who was a physician, how the wounds were probably produced. *Held* that the question was properly excluded, because it called for an opinion on matters not peculiarly within the knowledge of the medical profession.

The State v. Rainsbarger.

10. ——— : EVIDENCE TO SUPPORT VERDICT OF GUILTY. The deceased was last seen alive riding in a buggy. He was found dead under such circumstances as to suggest that he came to his death through an accident connected with the management of the horse and buggy ; and this was the theory of defendant. But the theory of the state was that defendant killed him, and then disposed the surroundings in such a way as to indicate death by accident. The jury found defendant guilty ; and, as there was no such lack of evidence to support the verdict as to lead to the conclusion that it was the result of passion and prejudice, *held* that it could not be reversed on appeal.
11. **Instructions : REPETITION NOT REQUIRED.** It is not error to refuse an instruction asked when the substance of it is embodied in those given.

Appeal from Marshall District Court.—HON. D. D. MIRACLE, Judge.

FILED, MARCH 10, 1888.

DEFENDANT was convicted for the murder of Enoch Johnson and sentenced to imprisonment for life in the penitentiary. He now appeals to this court.

Brown & Carney and C. C. Cole, for appellant.

A. J. Baker, Attorney General, for the State.

BECK, J.—I. The numerous objections to the rulings of the district court will be considered in the order of their discussion by counsel. While, perhaps, this order is not wholly in accord with the manner of presentation of the case which meets our preference, yet, as it is followed by counsel on both sides, it is more convenient to pursue it in our discussion of the case.

II. During the term at which defendant was tried, a motion for a continuance, on the ground of the illness of two of his counsel was overruled.

1. CRIMINAL
practice: con-
tinuance:
sickness of
defendant's
counsel: dis-
cretion.

The case had been pending for more than eighteen months, and had been continued two or three times ; once at least, with the consent of the state. The venue of the case had also been changed. Prior to the motion, and at the same term, the time for the commencement of the

The State v. Rainsbarger.

trial was extended for nearly a month on the ground of the illness of defendant's counsel. More than two weeks before the time thus fixed for the trial, the attorney for the state, having information that an application for a continuance would be made, notified defendant in writing that the commencement of the trial at the time fixed would be insisted upon. The application for the continuance was made at least ten days before the day set for the trial. It is shown that, at the time the motion was made, defendant had other counsel in attendance upon the court. The counsel who were sick were not present. The sickness of defendant's counsel *per se* was not sufficient ground for the continuance, if, in the exercise of reasonable diligence, he could have been ready for trial. The district court was more familiar than we can be with all the facts and circumstances of the case tending to show the prior diligence of the defendant, his ability to prepare for trial after he was advised of the illness of his counsel, and whether his cause could be so presented by the counsel attending the court, and others whom he might employ, that he would obtain justice. In the exercise of sound discretion, based upon all facts within the knowledge of the judge, the court was required to rule on the application. There is nothing in the record before us authorizing the conclusion that this discretion was abused. Indeed, the trial vindicated the conclusion, which must have been reached by the court below, that defendant would suffer no prejudice by denying his application for the continuance; for it was conducted with great ability, and it is quite apparent that there could have been no failure of justice for want, on the part of counsel trying the case, of ability, zeal and thorough familiarity with the facts of the case and the law applicable thereto. We conclude that no error or prejudice is shown which resulted from the overruling of the motion for the continuance. See, as an analogous case supporting our conclusion, *State v. Stegner*, 72 Iowa, 13.

III. The attorney for the state filed an affidavit showing the facts of the service of the notice that he

The State v. Rainsbarger.

2. — : — :
counter-affidavits. would urge the trial at the day fixed for it ; that other counsel than those who were ill were in the case; and probably some other matters. Defendant's counsel now insist that it was error to permit this affidavit to be filed. They claim that no affidavits can be submitted in resistance to an application for a continuance, and that this court has so held. But the decisions are to the effect that the statement of facts which are expected to be proved by an absent witness cannot be contradicted by counter-affidavits. *State v. Dakin*, 52 Iowa, 395 ; *State v. Scott*, 44 Iowa, 93. The obvious reason for the rule is based upon the provision of the statute to the effect that the state may avoid the continuance by admitting that the absent witness would testify as claimed in the affidavit for the continuance. At the trial the state may traverse the facts stated, and introduce evidence contradictory thereto, and if the state were authorized, upon the consideration of the motion, to contradict the statement of facts, it would, in effect, be the trial of an issue of fact to the court upon which, if fairly tried, the defendant should be permitted to introduce evidence, in support of his affidavit, which would involve delay and great inconvenience and unnecessary labor. But as to facts showing diligence and the like, the case is wholly different, and the same reasons do not apply thereto. This court has held that counter-affidavits, denying the existence of popular excitement shown as a cause for a continuance, may be received and considered. *State v. Wells*, 61 Iowa, 629. It thus appears that allegations of facts in an affidavit for a continuance, other than those to which it is claimed an absent witness will testify, may be contradicted by counter-affidavits.

IV. After the jury were impaneled, the defendant asked that they be placed in the care of the officers, and that they should not be permitted to separate. The ground of this request was that, at a prior trial of one indicted for the same homicide, a daily newspaper, published in the city where the court was held, had commented on the

8. — : keeping jury together: discretion of court.

The State v. Rainsbarger.

evidence in a manner prejudicial to defendant, and a repetition thereof was feared. The request was refused. This court has held, under the statute now in force applicable to the question (Code, sec. 4434), that the court, in the exercise of its discretion, may, in a case of the character of the one before us, permit the jury to separate under proper direction and admonition. *State v. Felter*, 25 Iowa, 67. The record fails to show abuse of discretion by the district court, or prejudice resulting to defendant from the refusal to grant his request. The court carefully, at proper times, admonished the jury not to read the newspaper accounts and discussion of the trial, and to observe other directions intended to guard them from influences which might have the effect to bias their minds. It is not shown that the jury disregarded these admonitions, or that any prejudice did result, or could have resulted, to defendant, from the action of the court in denying defendant's request.

V. The state was permitted to examine a witness whose name was not indorsed upon the indictment, as required by Code, section 4293, upon showing a notice to defendant, as required by Code, section 4421. Counsel for defendant insist that the requirements of this section were not observed, for these reasons:

4. —: using
witness not
named on in-
dictment:
notice to
defendant:
sufficiency.

(1) The notice shows that the witness resided in Kansas City, Kan., and it appeared that he lived in Kansas City, Mo. (2) The notice shows that the state expected to prove by the witness that the sheriff had sent a telegraphic communication to defendant, requesting him to come to the sheriff, and that the defendant asked the witness his opinion as to what he supposed the sheriff wanted. The evidence showed that the deputy sheriff had sent a communication by telephone. In other respects the evidence did not differ from the statements of the notice. It is insisted that, on account of the differences pointed out, the evidence was erroneously admitted. The purpose of the statute is to secure to the accused such a knowledge of the evidence which will be given against him as will enable him to make preparation to

The State v. Rainsbarger.

contradict or explain it, if either may be done. To this end the accused must be informed with sufficient certainty as to the witness who will testify against him, and the substance and effect of his evidence. The name of the witness and his place of residence should be given. But an omission to give his true place of residence cannot be reversible error, unless prejudicial. Under Code, section 4538, and frequent decisions of this court, errors which do not affect the substantial rights of defendant are not grounds for reversing the judgment. It is not made to appear that defendant was in any way misled or otherwise prejudiced by the error. So it is not shown that the statement in the notice, differing from the evidence in showing that the deputy sheriff had sent a communication by telephone, instead of a message by telegraph sent by the sheriff, wrought to defendant prejudice of any character or to any extent. If the state were required to produce evidence conforming in every important particular to the notice, the statute would defeat justice, when a noncompliance in unimportant matters would not prejudice the rights of the accused.

VI. The person for whose killing defendant was convicted was shown to have been riding in a buggy, in the night-time, when last known to be living. He was found dead, his body being some distance away from the buggy, and showing by unmistakable signs that death had resulted from violence. A wheel and other parts of the buggy were broken. A bottle of the character commonly used to hold bitters of a certain kind was found in the buggy. A witness was permitted to testify that he had sold defendant, the evening of the homicide, the same kind of a bottle, containing bitters. The evidence was objected to ; and it is now insisted that, as the identity of the bottle found in the buggy with the bottle sold to defendant is not shown, it did not tend to show that defendant was at or near the place of the homicide. But the evidence does tend to identify the bottle found

5. HOMICIDE :
evidence :
competent,
though weak.

The State v. Rainsbarger.

with the bottle sold defendant, in so far as that the bottles were alike, and contained the same kind of bitters. The evidence may be weak, but it cannot be denied that, unexplained, it does tend, in some degree, to show defendant's presence at the place. It was for the jury to determine its weight. Of its competency there can be no doubt.

VII. The defendant was surety for the deceased upon a bail-bond, requiring him to answer for a crime.

6. — : — :
motive. A witness was permitted to testify as to the reason inducing defendant to sign the bond ; that defendant said the deceased had threatened to make an exposure of the criminal acts of defendant ; that defendant had agreed to furnish deceased with money for his defense against the criminal charge and failed to do so ; that the deceased had a policy of insurance upon his life, which defendant was to receive in consideration of money advanced to deceased, and to some other like matters. The admission of the evidence is made a ground of objection. It was rightly admitted. It served to show the relations of the parties, and to some extent a motive for the crime.

VIII. The same witness testified, against defendant's objection, that defendant had in his possession a pair of "knuckles" before the homicide.

7. — : — :
weapon in
defendant's
possession. It is shown that injuries and wounds upon the head of deceased could have been made by instruments of the character of the "knuckles." The evidence, though of little weight, certainly tended to connect defendant with the killing.

IX. A witness was permitted to testify that on the night of the homicide he saw a buggy and team drawn through a street in the town where he lived.

8. — : — :
identification
of buggy by
its "rattle." He knew the defendant, and the defendant's buggy, and identified the buggy he saw as defendant's from the peculiar "rattle" of the wheels. He was a wagon-maker. Counsel think the evidence was erroneously admitted, as it was nothing more than the expression of the opinion of the witness. Undoubtedly animals and things may be identified, by those

The State v. Rainsbarger.

familiar with them, by the noises they make. The witness states that he identified the buggy by its "rattle." Observation teaches that identification in this manner may often be safely established. The business of the witness would tend to direct his attention to the buggy, and enable him to recognize the peculiar noise made by it. The evidence was rightly admitted.

X. The counsel for defendant, after stating hypothetically the condition of the body of the deceased, the character of the wounds, and other matters,
 9. —: expert testimony: what is not. asked a witness, who was a physician, how the wounds upon defendant were probably made. The evidence was rightly excluded. It sought for an expression of opinion based upon matters which were to be weighed and considered by the jury, and determined by the exercise of their own judgments, and not upon the opinion of another. The matters upon which the question was based were not peculiarly within the knowledge of the witness or of the profession to which he belonged.

XI. Many other objections to the rulings of the district court, upon the admission of evidence, are raised by counsel. Some of them are almost identical with those we have considered; all are of the same character. Their separate discussion is not demanded by their character, and would be of no interest to the parties or the profession. We are, therefore, authorized to dispose of them together by the single remark that we discover no error in the rulings to which they are directed.

XII. It is urged by counsel that the verdict is against the evidence in that there is no proof that the deceased came to his death by violence
 10. —: evidence to support verdict of guilty. inflicted by defendant or any other person. The evidence is voluminous, covering more than twelve hundred pages, and was given by more than one hundred witnesses. It is wholly circumstantial. It is impossible to recite it, much more to discuss it, without devoting several hundred pages to the work. It cannot be expected that this will be attempted. A careful reading of the voluminous record does not fail to

The State v. Rainsbarger.

impress the mind that the evidence discloses a motive possessed by defendant for the crime. The deceased was a burden upon defendant, who was under obligation to assist him in making his defense to a criminal charge to which he had been held to answer upon bail entered by defendant. The deceased held a life insurance which defendant regarded as pledged to reimburse him for his advances to the deceased, whose death would relieve defendant of the burden, and enable him to recover the life insurance, which he actually attempted. The deceased, on the day preceding the night of his death, started to go to a neighboring town. Defendant went to another town on business, which the evidence tends to show was a pretense. He knew of the route the deceased proposed to travel, and his purpose to make the journey. Defendant was seen the night of the homicide going in the direction of the place where the crime was committed, and there is evidence tending to show that he was present at the place. Very many incidents and circumstances point to this conclusion. We think that no reasonable mind could doubt that, if the death was caused by violence, defendant was the perpetrator, or one of the perpetrators. But it is insisted that the deceased came to his death by an accident, and not through criminal violence. The indications unmistakably show that his body was drawn upon the ground for a considerable distance. The lines were found fastened to one of his legs, and broken from the harness. A wheel of the buggy and other parts were broken. Blood was found upon the horse. The theory of defendant's counsel as to the cause of death is this: The buggy was broken while the deceased was driving. By the accident he sustained some injury causing blood to flow. He then arranged the harness, unbuckling the lines from the bits, looping them up, and mounted the horse. This accounts for the blood found upon the horse. He used the lines to assist in the support of his feet as stirrups. The horse became restive and threw him, and his leg became entangled and fastened in the lines, and by them he was drawn to the place where the body was found.

The State v. Rainsbarger.

The injuries to his head, which caused his death, were inflicted by the horse's feet. By the theory of the state, many of the circumstances are accounted for by the conclusion that they were intended to induce the belief that death resulted from accident. This theory explains the broken buggy, the dragging of deceased by the leg, etc. It also holds that the killing was not in the road where the buggy was found, and that the deceased had been carried on the horse to that place, after violence had been inflicted on him. It is impossible to recite all of the numerous facts relied upon to support each of these theories. There are difficulties in the way of assenting to either. The theory of the defendants, to our minds, seems impossible in all of its details; that of the state, in some, hardly probable. But we cannot say that the jury, in the exercise of intelligent, honest and unbiased discretion, could not have found the state's theory to be the true one. Applying the familiar rules requiring us to sustain a judgment unless there be such lack of evidence to support the verdict as will lead to the conclusion that it was the result of passion and prejudice, we are led to the conclusion that we must permit the verdict to stand.

XIII. The defendant complains of the refusal by the court to instruct the jury, as asked by him, upon the rule of reasonable doubt as applicable to the question whether the death resulted from accident, or violence feloniously inflicted. We think an instruction given fully covered this point. It was needless to repeat it. The refusal to give other instructions asked for defendant are also complained of by counsel. They are based upon the thought that the evidence is not sufficient to support certain facts, which, it is claimed, are essential to uphold the verdict. The instructions are, in effect, comments upon the evidence which would lead the mind to conclusions favorable to defendant. In this view they, or some of them, are objectionable in form; but we think that, so far as they are based upon the thought that the evidence is insufficient upon any point of the

11. INSTRUCTIONS: repetition not required.

Wait v. The Burlington, C. R. & N. Ry. Co.

case to authorize a verdict of conviction, they are erroneous, and were rightly refused.

XIV. Counsel think that the instructions fail to present rules to guide the jury in considering and weighing the circumstantial evidence, and that the failure to give proper instructions of that character is an error, demanding the reversal of the case. We do not concur in this view. In our opinion the jury were fully, carefully and correctly instructed.

We have given the case careful consideration. The character of the objections in no instance demands prolonged discussion. Many of them are so nearly like others disposed of, or are so obviously without merit, that they are not separately considered. It is our conclusion that the judgment of the district court must be

AFFIRMED.

WAIT V. THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

74 207
124 176

1. **Railroads : STOCK KILLED ON TRACK : NEGLIGENCE AS TO CLOSING GATE : QUESTIONS FOR JURY.** In an action against defendant for the value of colts which went upon its track through an open gate in its fence, and were killed, *held* that the questions—what constituted the proper exercise of care in the case, and whether a failure to inspect the gate for three or four days, or for a longer or shorter time, was negligence, or whether the gate's being open for thirty-six hours would raise a presumption of negligence against the defendant, and charge it with knowledge that the gate was open, were properly submitted to the jury. (Compare *Perry v. Dubuque S. W. Ry. Co.*, 36 Iowa, 102; *Bell v. Chicago, B. & Q. Ry. Co.*, 64 Iowa, 821.)
2. ——— : ——— : **DUTY TO CLOSE GATE.** In such case, *held* that it was defendant's duty to close the gate after obtaining knowledge that it was open, whether it was left open by its employes or others. (See cases cited).

Appeal from Keokuk District Court.—HON. D. RYAN,
Judge.

FILED, MARCH 12, 1888.

Wait v. The Burlington, C. R. & N. Ry. Co.

ACTION to recover under the statute double the value of two colts killed by a train operated upon defendant's railroad, at a place where it had a right to fence its track. There was a judgment on a verdict for plaintiff. Defendant appeals.

S. K. Tracy and Boal & Jackson, for appellant.

Mackey & Fonda and G. D. Woodin, for appellee.

BECK, J.—I. The evidence presented in the abstract shows that the plaintiff's colts, killed by defendant's train, escaped and went upon defendant's railroad track. There is evidence tending to show that they passed through a gate in the railroad fence, which appears to have been open at the time, and that it had been open for about thirty-six hours before the accident, which occurred early in the morning, or latter part of the night. The testimony also tends to show that the gate was not known to be closed for several days prior to the accident, and that the section-hands in charge of the road at that place were not required to pass over it more frequently than once a week, and their custom was to pass over it no oftener.

II. It is insisted by defendant's counsel that, as there was no proof tending to show actual knowledge on the part of defendant that the gate was open, the evidence fails to support the verdict. It is also insisted by counsel that the gate was not shown by the evidence to have been open for a length of time which would raise a presumption that it was known to the defendant. The defendant was required to exercise due care to keep its gate closed, and to obtain knowledge of its condition—that is, whether it was closed or open. If it failed to exercise such care, and through its negligence remained ignorant of the fact that the gate was open, it will be chargeable as having knowledge of that fact, which due care would have given it. Now, what constitutes the proper exercise of care, and whether a failure

1. RAILROADS:
stock killed
on track: neg-
ligence as to
closing gate:
questions for
jury.

Parker & Childs v. Michaels.

to inspect the gate for three or four days, or for a longer or shorter time, is negligence, or whether the gate's being open for thirty-six hours will raise a presumption of negligence against defendant, and charge it with the knowledge that the gate was open, are matters for the determination of the jury. *Perry v. Dubuque S. W. Ry. Co.*, 36 Iowa, 102; *Bell v. Chicago, B. & Q. Ry. Co.*, 64 Iowa, 321. It was the duty of defendant to close the gate after gaining knowledge that it was open, whether it was left open by defendant's employes or by others. *Aylesworth v. Chicago, R. I. & P. Ry. Co.*, 30 Iowa, 459; *Perry v. Ry. Co.*, *supra*; *Davis v. Chicago, R. I. & P. Ry. Co.*, 40 Iowa, 292. The district court rightly submitted the questions in the case involving defendant's liability upon all the facts disclosed by the evidence to the determination of the jury.

III. The jury were instructed in harmony with the doctrines we have stated, and instructions refused were in conflict therewith. There was no error in giving and refusing the instructions.

These views dispose of all questions in the case. The judgment of the district court is

AFFIRMED.

PARKER & CHILDS V. MICHAELS.

74	209
92	756

Appeal : LESS THAN ONE HUNDRED DOLLARS : QUESTIONS NOT ARISING BELOW : PRESUMPTION. In appeals involving less than one hundred dollars, the questions certified to this court will ordinarily be presumed to have been involved in the case; but where it is claimed by the appellee, in his abstract, that such questions did not arise in the court below, then the record will be examined, and unless it appears therefrom that such questions did in fact arise, they will not be considered in this court.

Appeal from Marshall District Court.—HON. D. D. MIRACLE, Judge.

FILED, MARCH 12, 1888.

VOL. 74—14

Parker & Childs v. Michaels.

THE plaintiffs are attorneys at law, and this is an action upon an account for legal services. There was a trial by jury, and a verdict and judgment for plaintiffs. Defendant appeals.

Brown & Carney and *W. H. Hammond*, for appellant.

J. M. Parker, for appellees.

ROTHROCK, J.—The cause involves less than one hundred dollars, and the appeal comes to us upon a certificate of the trial judge, which is as follows: “Where one of the plaintiffs, who are partners in the practice of law, agreed, orally, with the defendant, that the plaintiffs would render legal services for the defendant in his personal litigation, in consideration that the defendant would use his influence in soliciting business from others for the plaintiffs, and that no charge should be made for such services, and the defendant complied with the agreement, and performed it on his part:—*Question.* (1) Can the plaintiffs recover the value of the services rendered by them under such contract? (2) Is the agreement supported by a sufficient consideration to sustain a defense to the action for the services so rendered? (3) Is the agreement void as against public policy?”

It is contended in behalf of the appellees that the questions certified do not properly arise upon the record in the court below. It appears from the abstract of appellant that the defendant admitted the claim made by the plaintiff, but set up a counter-claim, by which he alleged that plaintiffs and defendant entered into a contract by which the plaintiffs agreed to perform such legal services as the defendant might personally require, in consideration that defendant would aid and assist plaintiffs in securing business, and assist them in the management and conduct of cases brought or defended by said firm. And he averred that he had fully performed his contract. It will be seen that, in

Parker & Childs v. Michaels.

the absence of any evidence, the plaintiffs were entitled to recover. Appellees filed an additional abstract, and set out the evidence of the defendant, which shows without question that the averments of his answer were untrue, and demanded that appellant should file a transcript. Appellant in turn denied the correctness of appellees' abstract, and filed a transcript. Upon examining this transcript, we find that the cause came into the district court upon an appeal from a justice of the peace. The transcript of the record entry shows that the cause was tried to a jury, and evidence was introduced, and the court instructed the jury to find for the plaintiffs. The record does not show what evidence was introduced, nor upon what ground or for what reason the court directed the jury to find for the plaintiffs. We have frequently held that the questions certified will be presumed to have been involved in the case; but we have also held that, where it is claimed by the appellee that such questions did not arise in the case in the court below, we will look into the record to determine that fact. Upon examining the transcript in this case, we do not find that the defendant introduced any evidence. If he did not, the court properly directed the jury to find for the plaintiff, without regard to the validity of the defense pleaded, and the questions certified are mere abstract propositions not necessary to a determination of the case.

The appeal will be

DISMISSED.

 Dickens v. The City of Des Moines.

were made a part of the record. Appellee filed an additional abstract, in which he denies that a bill of exceptions was ever settled, signed or filed in this case; denies that the abstract of appellant is a full and correct abstract of the record, and denies that the abstract of appellant, and the additional abstract of appellee, together, present a full and correct abstract of the record. Appellant filed an amendment to his abstract, but does not in any manner controvert the statements of the additional abstract. They must, therefore, be taken as true. *Kearney v. Ferguson*, 50 Iowa, 72; *Burkhart v. Ball*, 59 Iowa, 630; *Richardson v. Hoyt*, 60 Iowa, 70; *State v. Tucker*, 68 Iowa, 51; *Maxwell v. La Brune*, 68 Iowa, 690. This action is triable in this court *de novo*. A formal bill of exceptions is not required, but it should appear that the evidence offered in the district court was duly made a part of the record, and that the abstract submitted to us is full and correct, not only as to the evidence, but as to the entire record. *Daniels v. Langdon*, 52 Iowa, 741; *Greer v. Dickey*, 53 Iowa, 755; *Gaylord v. Taft*, 53 Iowa, 757; *Hart v. Jackson*, 57 Iowa, 76; *Boyle v. Mallett*, 67 Iowa, 516. Since it is not shown that we have a full and correct abstract of what should be of record, the case cannot be tried in this court. It is, therefore,

AFFIRMED.

74 216
108 28

DICKENS V. THE CITY OF DES MOINES.

1. **Appeal: EVIDENCE TO SUPPORT VERDICT.** The evidence being conflicting, the verdict based thereon cannot be set aside on appeal.
2. **Personal Injury: MARRIED WOMAN: LOSS OF SERVICE: PLEADING AND EVIDENCE.** In an action by a married woman for a personal injury, she averred that since the injury she had been, and always would be, unable to perform any kind of work or service; but she did not aver that she had a separate business, independent of her duties as a housewife, which alone would entitle her to damages for loss of ability to work. *Held* that, in the absence of a motion to make the petition more specific, she was properly allowed to prove that she had such separate business.

Dickens v. The City of Des Moines.

3. **Evidence : HARMLESS ERROR.** Error in admitting evidence is no ground for reversal where it appears that it wrought no prejudice to appellant.

Appeal from Polk District Court.—HON. M.
KAVANAGH, JR., Judge.

FILED, MARCH 12, 1888.

THIS is an action to recover damages for a personal injury which the plaintiff avers she received by a fall upon a sidewalk in the defendant city. There was a trial by jury, which resulted in a verdict and judgment for plaintiff for one thousand dollars. Defendant appeals.

Detrick & McMartin, for appellant.

D. O. Finch and *D. Donovan*, for appellee.

ROTHROCK, J.—I. The plaintiff claims that she was injured by reason of a board having been removed from a sidewalk, leaving an opening therein, into which she stepped while passing along the walk in the night, and without any negligence on her part. It is conceded that there was an opening, or hole, in the sidewalk, caused by the removal of a board, and the evidence as to whether plaintiff fell at that point is very conflicting. It is also conceded that the plaintiff's right leg is completely paralyzed, and the evidence is in great conflict whether it was caused by a fall, or whether it was attributable to other causes. We are asked to reverse the case upon the merits, because the evidence does not sustain the verdict. The evidence has been fully presented to us in two abstracts—one prepared by appellant and the other by the appellee; and counsel have fully argued the facts of the case. After giving the abstracts and arguments full consideration, our conclusion is that we cannot disturb the verdict as being contrary to the evidence.

1. APPEAL : evidence to support verdict.

 Dickens v. The City of Des Moines.

II. The plaintiff is a married woman, and she was permitted to show that she had a separate business, which she conducted on her own account, and independent of her duties as a housewife. The defendant objected to this evidence, on the ground that there was no claim made in the petition for damages for loss of time, or damage to her business. It is claimed that the overruling of defendant's objection to this evidence was erroneous. It is averred in the petition that ever since said injury plaintiff has "been unable to do or perform any kind of work, labor or service," and "that, by reason of said injuries, the said plaintiff will, for and during the remainder of her natural life, be unable to do or perform any kind of work, labor or service." The plaintiff, being a married woman, could not recover for inability to perform work and labor, unless she had a separate business, independent of her husband. It is very plain that unless she had such separate business the averments of her inability to work and labor would have rendered her petition liable to be assailed by the defendant, as claiming elements of damage for which her husband was alone entitled to recover. It may be that she could have been required, by motion, to make her petition more specific in this respect; but we think, in the absence of such motion, the evidence was correctly admitted.

III. Counsel for appellant claim that the court erred in permitting a witness to state that the walk was out of repair, without giving the time when and place where the defect existed. The evidence complained of was without prejudice, when considered in connection with all of the testimony given by the witness.

We discover no error in the record, and are united in the conclusion that the judgment should be

AFFIRMED.

Griffin v. Tuttle.

GRIFFIN V. TUTTLE *et al.*

74	219
96	717

1. **Taxation: ASSESSMENT TO UNKNOWN OWNER: WHAT SUFFICIENT.** (*Burdick v. Connell*, 69 Iowa, 458, *followed*).
2. **Tax Sale and Deed: WHEN NOTICE TO REDEEM NOT NECESSARY.** When land has been sold for taxes, and at the time of giving notice to redeem, it is taxed to an unknown owner, and no one is in possession, the purchaser is entitled to a deed without notice. (*Meredith v. Phelps*, 65 Iowa, 118, *followed*).
3. ———: **NOTICE TO REDEEM: TO WHOM LAND TAXED.** When the taxes on land sold for taxes have not yet been levied for the year in which notice to redeem is given, but the land has been assessed to the unknown owner, and the assessor's book returned to the auditor, the land is then taxed to the unknown owner, in contemplation of the statute requiring notice to be given to the person to whom it is taxed. (Compare *Heaton v. Knight*, 63 Iowa, 686, and 65 Iowa, 434).
4. ———: **SALE FOR LESS THAN TAXES DUE.** A tax deed is not void on its face because it shows that the land was sold for less than the whole amount of the taxes due, for such sale is not unlawful (Laws of 1876, chap. 79), and the deed is presumptive evidence that the sale was lawfully made.

Appeal from Clay District Court.—HON. GEO. H. CARR, Judge.

FILED, MARCH 12, 1888.

ACTION to set aside certain tax deeds, and determine the ownership of real estate. Judgment for defendants, and plaintiff appeals.

Harrison & Jenswold and *Powers & Lacy*, for appellant.

Glass & Hughes, for appellees.

SEEVERS, C. J.—I. It is conceded that G. H. Randall owned the real estate in controversy, unless the tax deeds under which the defendants claim are valid. Randall conveyed the premises to Patterson, and he to the plaintiff, in 1885. The real estate was sold for delinquent taxes on the second day of October, 1876, and the treasurer, on the fifteenth day of January, 1881, executed a conveyance to M. Tuttle, and the defendants are his heirs and legal representatives. In 1878 the real estate was taxed to G. H. Randall. In 1880 it was taxed to the unknown owner, and the tax-list of 1874 was not introduced in evidence. A new assessment of real estate must be presumed to have been made in 1879, because there is a statute which so provides. The defendants claim that such an assessment was in fact made, and the books of the assessor were introduced in evidence so showing, as they claim; but the plaintiff claims that such assessment is void. An expiration notice was published, which is conceded to be insufficient, and the claim of the defendants is that no such notice was required, because the land was taxed to an unknown owner at the time the plaintiff, under the statute, was required to give such notice, if such time was two years and nine months after the sale, or when the tax deed was obtained. The assessment made in 1879 is as follows:

1. TAXATION:
assessment to
unknown
owner: what
sufficient.

ASSESSOR'S BOOK, SUMMIT TOWNSHIP, 1879.

Owner's name.	Under 45 years.	Over 45 years.	No. road dist.	No sub. dist.	Part of section or name of town.	Section or lot.	Twp. or block.	Range.	Acres.	Val. per acre.	Value of land.
Unknown.					S. W. of N. W.	34	97	37	40	3.50	140.
					S. W. of S. W.	"					
					S. E. of "	"					
					N. E. of "	"					
					N. W. " "	"					
					S. W. " S. W.	35					
					S. E. " "	"					
					N. E. " "	"					
					N. W. " "	4					
					N. E. " N. E.	35					
					N. E. " N. W.	"					
					N. W. " N. E.	"					
					S. W. " S. E.	"					
					S. E. " S. E.	"					
					N. E. " "	"					
					N. W. " S. W.	36					
					N. E. " "	"					
					S. E. " "	"					
					S. W. " "	"					
					S. E. " S. E.	"					
					S. W. " "	"					
					N. W. " "	"					
					N. E. " "	"					
					N. W. " S. E.	"					
					S. W. " "	4			1000		
Total No. of acres.											
Total value.											3500

The land in controversy is the east half of the southeast quarter of section thirty-five, in township ninety-seven, range thirty-seven.

II. It is insisted that there was no assessment, because as to the land in controversy the township and range, the number of acres, valuation, and name of the owner, are not stated, but that in all of said matters the assessment is a mere blank. The assessment is substantially like, if it is not identically the same as, the assessment in *Burdick v. Connell*, 69 Iowa, 458. Following that case, the assessment in question must be held to be sufficient.

III. There was no person in possession of the land, and, if it was taxed to an unknown person, then the

2. Tax sale and deed: when notice to redeem not necessary.

tax purchaser was entitled to a deed without giving any expiration notice. It was so held in *Meredith v. Phelps*, 85 Iowa, 118, and cases cited; and in *Heaton v. Knight*, 63 Iowa, 686, it is held that the assessments in a certain

Griffin v. Tuttle.

class of cases must be regarded as a taxation of the land. The only essential difference between the case last cited and this is, that in the former the assessment was to a known owner, and in the latter to an unknown person.

3. — : notice
to redeem: to
whom land
taxed.

Notwithstanding this difference, the assessment under the cited case must be regarded as a taxation of the real estate. The tax purchaser was bound to examine this assessment in order to determine whether he was required to give an expiration notice, and, if he did so, he then found the land was taxed to an unknown owner, and, therefore, he was not required to give such notice. He was not bound to look back of the assessment. The tax-list for 1879 was not then made out. If it be conceded that he was bound to look at the tax-list when he obtained his deed, this, in no respect, affected his duty, for the reason that such list showed that the land was taxed to an unknown owner.

IV. The tax deeds recite that the purchaser offered to pay a named sum for the land, being less

4. — : sale for
less than taxes
due.

than the whole amount of taxes due thereon, and, as the same was the highest amount bid, the land was struck off to him. It is urged that, because of this recital, the deed is void on its face, for the reason that section 876, and other sections of the Code, contemplate that the land shall be sold for the whole amount of the taxes due on each separate parcel of the real estate. Chapter seventy-nine, Acts Sixteenth General Assembly (Miller's Code, p. 215), provides that in certain cases lands may be sold for less than the amount of taxes due thereon. The deed is presumptive evidence that the sale was lawfully made, and, therefore, it follows, there being no evidence to the contrary, that the sale was made in conformity to the statute last referred to.

AFFIRMED.

 Peterson v. Little.

PETERSON V. LITTLE *et al.*

1. **Homestead: EXEMPTION: PRIOR JUDGMENT.** A homestead is not exempt from a judgment against the owner rendered before the acquisition of the homestead.
2. **Judgment: ORIGINAL NOTICE: DISCREPANCY IN NAME.** Where the defendant in an action was the wife of G. B. L., and she was described in the original notice and the officer's return of service thereon as Mrs. G. B. L., but her own proper name was Ora M. L., and judgment by default was rendered against her as Ora M. L., *held*, in the absence of a showing that she was not equally well known by both names, that she could not assail the judgment in a collateral proceeding on the ground that the notice had not been served upon her.
3. **Judicial Sale: INADEQUACY OF PRICE: VALIDITY.** Gross inadequacy of price alone is not sufficient to avoid an execution sale. (See cases cited in opinion.) The period of redemption fixed by statute is ample protection to the debtor in such cases.

74	223
78	481

74	223
92	642

74	223
130	368
130	369

74	223
134	58

74	223
141	28

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, MARCH 12, 1888.

ACTION in equity to quiet title to certain real estate. There was a decree for the defendants, and plaintiff appeals.

O. C. Peterson, for appellant.

Cole, McVey & Clark, for appellees.

ROTHROCK, J.—I. The real estate in controversy consists of a lot in the city of Des Moines, upon which there is a dwelling-house in which the defendants, who are husband and wife, reside. The defendant Ora M. Little, the wife of the defendant G. B. Little, became the owner of the property by warranty deed from one Talbot on the second day of April, 1885. In February, 1885, A.

 Peterson v. Little.

T. McCargar recovered a judgment before a justice of the peace against both the defendants for \$29.85, and on the twenty-third day of June, 1885, a transcript of said judgment was filed in the office of the district court, and on the same day an execution was issued on the judgment and levied on the property in controversy, and on August 3, 1885, the property was sold at sheriff's sale to said McCargar to satisfy said execution, the amount of the bid being \$54.25. McCargar assigned the sheriff-sale certificate to O. C. Peterson, and on August 5, 1886, the sheriff executed and delivered to Peterson a deed for the premises. In a few days thereafter Peterson made a quit-claim deed of the property to the plaintiff. The defendants were at the time of the trial in the court below still in possession of the property. They claim that the judgment against them is void, and demand that the sheriff's sale and deed be set aside upon several grounds, which we will proceed to consider.

(1) They assert that the property is their homestead, and not liable to execution. But the record shows

1. **HOMESTEAD:**
exemption:
prior judgment.
that the judgment was rendered against them before they acquired the property. It is, therefore, not exempt from the payment of this debt.

(2) It is further claimed that there was no original notice served upon them in the action before the justice of the peace, and that he had, therefore, no

2. **JUDGMENT:**
original
notice: discrepancy in name.
jurisdiction nor authority to render a judgment. The facts in relation to this claim are as follows. An original notice was issued by the justice of the peace, of which the following is a copy:

"A. T. McCargar, Plaintiff, v. G. B. Little, and Mrs. G. B. Little, his wife, Defendants.

"State of Iowa, Polk County,—ss. In Justice's Court,
Before F. R. McCabe.

"To said Defendants: You are hereby notified that A. T. McCargar, the plaintiff above named, claims of you the sum of twenty-nine and 85-100 dollars,

Peterson v. Little.

(\$29.85) justly due from you, with six per cent. interest thereon from this date, on account for board and lodging furnished you and your family, at your request, and that unless you appear before the said F. R. McCabe, a justice of the peace, at his office in Lee township, in said county, on the seventh day of February, 1885, at nine o'clock a. m. of that day, and make defense to said claim, judgment will be rendered against you for that amount and costs.

“Dated at Des Moines, Iowa, the second day of February, 1885.

“F. R. McCABE, Justice of the Peace.”

Upon this notice a return was indorsed, which is as follows :

“The within notice came into my hands on the second day of February, 1885, and I duly served the same on the second day of February, 1885, by reading the within notice to the within-named defendant G. B. Little, and Mrs. G. B. Little, his wife, a member of the family over fourteen years old, and delivering her a true copy of the same. Done in Lee township, Polk county, Iowa, this second day of February, 1885.”

It is urged that the return did not show a service on either of the parties. The plaintiff appears to concede that the return does not show service as to G. B. Little, but claims that the service was full and complete as to Mrs. G. B. Little. We think his position must be sustained. It appears from the return that the notice was read to her, and a true copy delivered to her, and the notice apprised her that a judgment was demanded against her. It is true, she is described in the notice and in the return of service as “Mrs. G. B.” Little, and the judgment is rendered against “Ora M.” Little, but there is no showing that she was not known by the one name as well as by the other. It is true, the judgment was by default; but her answer is in the nature of a cross-petition, and she seeks to attack the judgment, not in a direct, but in a collateral, proceeding. It

Peterson v. Little.

appears to us that the judgment is valid as against her, and, the title to the property being held by her, the judgment became a valid lien thereon when the transcript was filed in the office of the district court.

(3) The evidence shows that the property is of the value of about fifteen hundred dollars. There was a mortgage upon the premises, which was a lien prior to the judgment in question. The mortgage has been foreclosed, and the property was sold at a foreclosure sale in January, 1887, for eight hundred and twenty-four dollars; that being the amount of the mortgage, interest and costs of foreclosure. The period of redemption expired in January of the present year. We are not advised as to whether redemption has been made by either of the parties to this suit, and that is not a material question in this case. The defendants claim that the sheriff's sale on the McCargar judgment should be set aside because the property was sold at a grossly inadequate price. The difference between the amount necessary to redeem from the mortgage sale and the value of the property would be about seven hundred dollars. The bid at the sheriff's sale was \$55.25. We have found that the judgment was a lien upon the lot. It was the right of McCargar to collect the judgment by the levy and sale of any property of the defendants liable to execution. There is no showing that he was guilty of oppression in refusing to levy on other property. Indeed, it does not appear that defendants owned any other property. So far as appears, the levy and sale were in all respects regular. There is neither averment nor proof that the sale was improperly conducted, or that McCargar did anything to prevent bidders from attending the sale and purchasing the property. It was his right to collect the judgment, and we know of no rule requiring him to bid more than his judgment, interest and costs. In addition to this, the evidence shows that the defendant G. B. Little knew before the sale that there was a judgment, and that the property was advertised for sale. The year of redemption was

8. JUDICIAL sale:
inadequacy
of price:
validity.

First Nat. Bank of Storm Lake v. Harwick.

allowed to expire without any effort to redeem. Indeed, there is no fact in the case from which it can be inferred that McCargar acted fraudulently in anything he did in the premises. Gross inadequacy of price is not sufficient to avoid a judicial sale. *Cavender v. Heirs of Smith*, 1 Iowa, 306; *Wallace v. Berger*, 25 Iowa, 456; *Sigerson v. Sigerson*, 71 Iowa, 476. If we should hold this sale voidable on this ground, every creditor holding a small claim against the owner of an indivisible tract of real estate would be precluded from enforcing collection of his claim in any other way than by a bid so large that it could not be said to be grossly inadequate. We think it is his right in good faith to bid and buy at the amount of his claim. In such case the period of redemption fixed by statute is ample protection for the debtor.

REVERSED.

FIRST NATIONAL BANK OF STORM LAKE V. HARWICK,
GARNISHEE.

1. **New Trial : ABSENCE OF COUNSEL : ACCIDENT : DISCRETION OF COURT.** When this cause came on for trial, defendant's counsel was engaged in an important criminal cause in a distant county, though he had, twenty-five days before, been subpoenaed by plaintiff as a witness in this case, and his fees paid. He, therefore, committed this case to another attorney, who lived in the same city with himself, and who undertook to be present and attend to the case for defendant. He failed, however, to arrive until after trial and judgment against defendant, which was on the second day of the term. It was not a physical impossibility for him to have been present at the time of the trial. But *held* that the court, upon a motion for a new trial, had a right to take judicial notice of the state of the weather and of the condition of the docket, in determining whether he was negligent or not, and that, exercising the usual presumption in favor of the lower court in such cases, an order sustaining the motion for a new trial could not be disturbed on appeal.
2. ——— : **SHOWING OF MERITS : ANSWER OF GARNISHEE.** Where judgment has been rendered against a garnishee in his absence, upon his answer, which is on file in the case, a new trial may be granted without any othershowing of merits than is made by such answer.

Appeal from Sac Circuit Court.

FILED, MARCH 12, 1888.

THIS is an appeal by the plaintiff from an order setting aside a judgment against the garnishee, and granting a new trial.

Robinson & Milchrist, for appellant.

A. E. Clarke and *Theo. Hawley*, for appellee.

REED, J.—The garnishee was garnished on execution as a supposed debtor of T. J. Harwick. He appeared at the next term of the court, and his answers were taken in open court, in which he denied that he was in any manner indebted to the defendant, or that he had any property in his possession belonging to him. Plaintiff filed a pleading controverting the answers, and the cause was continued. The issue was as to whether a certain draft belonging to the defendant, but which was payable to the order of the garnishee, and which in his answer he admitted was at one time in his possession, was in his hands after the notice of garnishment was served upon him. At the next term of the court, which was in April, 1886, plaintiff filed a motion for a continuance on the ground of the absence of A. E. Clarke, who, he alleged, was a material witness in his behalf. Mr. Clarke resided at Fort Dodge, and was attorney for garnishee, but was prevented by the sickness of a member of his family from attending that term of court. Mr. Hawley, also of the Fort Dodge bar, appeared for the garnishee in the cause, at Mr. Clarke's request, and resisted the motion, but the continuance was granted. At the next term of court the cause was taken up for trial on the afternoon of the second day of the term, but neither the garnishee nor his counsel was present. Plaintiff introduced his evidence, and, on the showing made, a judgment was rendered against the

1. New trial:
absence of
counsel: ac-
cident: discre-
tion of court.

First Nat. Bank of Storm Lake v. Harwick.

garnishee for \$879.63, and the costs of the proceeding. On the same day, however, Mr. Hawley appeared for the garnishee, and filed a motion to set aside the judgment, and grant a new trial, on the grounds (1) that the cause was irregularly taken up out of its order, and tried; and (2) that the garnishee was prevented, by accident and surprise, from appearing and defending. The evidence in support and resistance of the motion was submitted by affidavits, and on the hearing the court overruled the first and sustained the second ground of the motion.

The evidence in support of the motion shows that the district court was in session in Humboldt county at the same time, and Mr. Clarke was engaged in an important criminal cause in that court. He requested Mr. Hawley to go to Sac county, and give attention to this case. Mr. Hawley's professional engagements were such, however, that he was not able to leave Fort Dodge on the first day of the term. On the next day he went to the county-seat of Sac county, going by the most direct route by rail; but he reached there after the judgment was rendered. By going another route, however, he could have reached there in time to have been there before the case was taken up, but by that route he would have been compelled to travel some fifteen miles by stage. There were fifty-six cases on the docket ahead of this one, some of which were trial causes, but the parties were not yet ready for trial when this case was taken up. A subpoena was served upon Mr. Clarke, requiring him to attend and give evidence on behalf of plaintiff, and his fees paid him. The subpoena required him to attend on the second day of the term, and the service was made twenty-five days before that. The proceeding was had under subdivision three, section 2837, of the Code, which makes "accident or surprise which ordinary prudence could not have guarded against" a cause for granting a new trial. We think we would not be warranted in disturbing the order appealed from. The court, we think, was warranted in

First Nat. Bank of Storm Lake v. Harwick.

finding that the failure of the attorney for the garnishee to be in attendance when the case was taken up was accidental, and that ordinary prudence was exercised to guard against it. When Clarke employed Mr. Hawley to go to Sac county, and give attention to the cause at that term, he did all that ordinary prudence required, or at least the court may well have so found. We do not regard the fact that he disregarded the subpoena as material to this inquiry. He would have been answerable to plaintiff, perhaps, in damages, for his failure to attend in obedience to the subpoena; and it may be that the court could have punished him for contempt. But the question here is whether he acted with "ordinary prudence" with reference to the defense of the action. When an attorney is unable from any cause to give attention to the business of his client which has been entrusted to him, he may lawfully place it in the hands of other competent counsel. And when he has done that, and placed the counsel so selected in possession of all the facts known to him, or essential to the proper discharge of the duty devolving on him, and received his undertaking to attend at the proper time for the transaction of the business, he has done what ordinary prudence demands. The court may also have found from the evidence that Mr. Hawley exercised ordinary prudence to be in attendance at the proper time. True, it was a physical possibility for him to have reached there at an earlier hour. But the question does not necessarily depend upon whether he did all that was physically possible. And there were matters not shown by the evidence of which the court might take notice in determining the question; such as the state of the weather, and the apparent condition of the docket. If the weather was inclement, and the condition of the docket did not indicate a necessity for his presence at an earlier hour than that at which he arrived, he certainly was not negligent in selecting the all-rail route of travel, rather than the other. We will presume, in favor of the correctness of the ruling below, that the facts with reference to these matters were

Hunt v. The Farmers' Ins. Co.

material, and were considered by the court in determining the motion.

It was contended by appellant, however, that the motion should have been overruled for the reason that no showing was made that the garnishee had any defense. True, no showing on that subject was made, either in the motion or by the evidence in support of it; but the garnishee had been examined in open court at the former term, touching his indebtedness to the defendant, and his examination was of record in the case. The court knew from that the nature of his claim, and was authorized to consider it in determining the question.

The order appealed from will be

AFFIRMED.

ROBINSON, J., having been of counsel, took no part in the determination of the case.

HUNT V. THE FARMERS' INSURANCE COMPANY.

Justice's Court: TAKING CASE FROM JURY. A justice of the peace has no power to take a case from a jury and dismiss it on the ground that the evidence shows that there is no cause of action. (See cases cited in opinion).

Appeal from Humboldt District Court.—HON. GEORGE H. CARR, Judge.

FILED, MARCH 12, 1888.

THE plaintiff brought an action against the defendant before a justice of the peace on a policy of insurance. There was a trial by jury, verdict for plaintiff, and judgment rendered thereon. The defendant removed the case to the district court by a writ of error. The court dismissed the plaintiff's action, and rendered judgment against him for costs, and the plaintiff appeals.

J. C. Raymond, for appellant.

Clark & Taft, for appellee.

SEEVERS, C. J.—The amount in controversy being less than one hundred dollars, we are required to answer the following question propounded by the district court: “In an action before a justice of the peace, brought upon a policy of insurance, there being a clause in said policy that no action can be maintained thereon unless brought within six months from the time of said loss, after the evidence is all introduced by the parties before a jury, and it appearing therefrom that more than six months had elapsed from the time of said loss to the commencement of said action, has a justice a right to take the case from the jury and dismiss plaintiff’s action?” It has been held that a justice of the peace has no power to instruct a jury, and that he possesses only such powers as are conferred by statute. *St. Joseph Manf. Co. v. Harrington*, 53 Iowa, 380. A justice has the power to set aside a default, or the dismissal of a cause. Code, sec. 3543. But he cannot arrest a judgment or set aside the verdict of a jury. Code, sec. 3550; *Rhodes v. De Bow*, 5 Iowa, 260; *Dupont v. Downing*, 6 Iowa, 172. The question implies that evidence was introduced before the jury showing that more than six months had elapsed after the loss before the action was commenced, and we are asked whether, in such case, the justice has the power to take the case from the jury and dismiss the action. We are clearly of the opinion that he cannot, for the reason that no such power is conferred by statute. We cannot imagine a case in which a justice would have such power. When a jury is called before a justice in a case, and duly impaneled, the justice cannot take the case from the jury, his only power being to discharge the jury if they fail to agree. The foregoing question must be answered in the negative, and the judgment of the district court

REVERSED.

MATTOCKS V. THE DES MOINES INSURANCE COMPANY.

74 223
88 420

1. **Fire Insurance: CONSENT TO OTHER INSURANCE: FORM OF.** The policy in question provided that it should be void if, without permission therefor in writing *thereon*, the assured should procure other insurance on the property. *Held* that additional insurance consented to by the company in writing did not avoid the policy, even though the consent was not written upon the policy.
2. **——: WAIVER OF MORTGAGE BY AGENT.** The policy provided that it should be void if the property was mortgaged. But where notice of an existing mortgage was given to the agent who took the risk, and he gave the written consent of the company that the policy should continue in force notwithstanding the mortgage, *held* that the company was bound by the waiver.
3. **——: OWNERSHIP OF PROPERTY: DELIVERY OF DEED.** The policy provided that it should be void if the insured was not the owner of the property. The property had been deeded to the insured, and the deed left with another to be delivered to her, but it was not delivered till after the fire. *Held* that she was the owner.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, MARCH 12, 1888.

ACTION on a policy of insurance against loss or damage by fire. Trial to the court, judgment for the plaintiff, and defendant appeals.

Cole, McVey & Clark, for appellant.

Lawrence & Burd, for appellee.

SEEVERS, C. J.—I. The policy provides that it “shall be void and of no effect if, without permission therefor in writing hereon, the assured shall now have, or hereafter procure, another policy of insurance, whether valid or not, on property covered, in whole or in part, by this policy.”

1. FIRE INSUR-
ance: consent
to other insur-
ance: form of.

Mattocks v. The Des Moines Ins. Co.

There was additional insurance in another company, and, therefore, it is insisted that the plaintiff cannot recover. But there was evidence tending to show that an agent of the defendant was notified of such additional insurance, and that he signed a paper authorizing or permitting it. It is said that such consent was not indorsed in writing on the policy, but this we do not think was material. The permission was in writing, and the material object of the condition is that the permission shall be in writing, and, therefore, definite and certain, and so disputes as to its contents could not arise. It is further said that there was no evidence that the agent was authorized to execute the permit, but we think there was sufficient evidence to warrant the court in finding that such agent had the requisite authority.

II. Another condition of the policy provides that it should be void if the property insured was mortgaged or otherwise incumbered. The evidence shows that there were four mortgages on the property, as shown by the records, but it shows that there was but one which was in force. There was evidence tending to show that notice of such mortgage was given to the agent who insured, or wrote the policy, and that he gave the written consent of the company that the policy should continue in force notwithstanding the mortgage. The court was warranted in so finding, under the evidence.

III. Another condition of the policy provides that it shall be void unless the insured was the unconditional owner of the property. There was evidence tending to show that the property was owned by one Williams; that he conveyed it to the plaintiff in 1883, and that the deed was left with one Cleland to deliver to her, but she did not receive it until after the fire. We think this sufficiently shows that the plaintiff was the owner of the property. The delivery to Cleland was for her use and benefit, and vested the title in her; at least, the court was warranted in so finding.

IV. Another condition of the policy provides that

2. — : waiver
of mortgage
by agent.

8. OWNERSHIP
of property:
delivery of
deed.

Snedaker v. Jones.

fraud or false swearing, misrepresentation or concealment of a material fact renders it void. In our opinion, there is not a particle of evidence tending to show that this condition was violated.

AFFIRMED.

SNEDAKER V. JONES.

Intoxicating Liquors: NUISANCE: LIABILITY OF CHATTELS EMPLOYED: KNOWLEDGE OF OWNER: WHEN AND HOW SHOWN. Plaintiff was the owner of certain chattels used in a building where intoxicating liquors were unlawfully sold. The nuisance arising therefrom was enjoined, and, under an execution issued upon a judgment for costs in the case, the said chattels were seized and sold. Plaintiff was not a party to the injunction suit, and he now brings this action to recover the value of the chattels, on the ground that it was not adjudicated in that case that the chattels were used in the unlawful traffic *with his knowledge*. *Held* that the chattels were liable, if they were so used with his knowledge, without an adjudication of that fact; but that the officer took them at his peril, and had the burden of establishing the guilty knowledge, when called upon so to do, in an action against him for the goods or their value. (Compare *Polk County v. Heirb*, 37 Iowa, 361, and *Cheadle v. Guittar*, 68 Iowa, 680.)

Appeal from Union District Court.—HON. J. W. HARVEY, Judge.

FILED, MARCH 12, 1888.

ACTION to recover of defendant the value of personal property taken and sold by him under process issued on a judgment in favor of the state of Iowa against R. H. Dillow. Trial to the court. Judgment for the defendant, and plaintiff appeals.

D. W. Higbee and *R. H. Hanna*, for appellant.

J. B. Sullivan, for appellee.

SEEVERS, C. J.—This case was submitted to the district court upon the pleadings and an agreed statement of facts, and therefrom it appears that an action in equity was commenced in the superior court of Creston to enjoin a nuisance created by the sale of intoxicating liquors by R. H. Dillow and August Doge, in or upon a certain building or premises sufficiently described. The court found that the existence of the nuisance had been established, and enjoined the same. A judgment was also entered against Dillow and Doge for costs, which was adjudged to be a lien on the personal property used in said building in carrying on the unlawful business. A special execution was issued on the judgment, and certain property used in the building was seized and sold by the defendant under said process. The plaintiff, claiming to be the owner of such property, brought this action, to recover the value thereof. It must be conceded that he became the owner of such property before the rendition of said judgment, and that he was not a party to the action in which the judgment was rendered. It is provided by statute that all property used as that in question was, with the knowledge of the owner or his agent, shall be liable for the payment of the judgment and costs in any proceeding brought for a breach of or to enforce the statute prohibiting the unlawful sale of intoxicating liquors. Chapter 66, sec. 12, Laws 21st Gen. Assem.; Code, sec. 1558. As the plaintiff was not a party to the judgment rendered by the superior court of Creston, it cannot be said to be an adjudication binding on him that he had knowledge that the property in question was used as above stated. Therefore, when the defendant seized it on the process issued on such judgment, he did so at his peril, and took upon himself the burden of establishing that the property was liable to be seized under the process in his hands. If he has done this, then the plaintiff is not entitled to recover. This is the holding in *Polk County v. Heirb*, 37 Iowa, 361. See, also, *Cheadle v. Guittar*, 68 Iowa, 680. The agreed statement of facts

The State v. Tierney.

shows that R. H. Dillow was acting as a clerk of the plaintiff, and sales of intoxicating liquors were made by the former in a building in which the property to recover for which this action was brought was situated and used. The plaintiff was a witness in the action against Dillow. The foregoing, and the character of the property, justified the district court in finding that it was used in the building for the purpose of violating the prohibitory law, and counsel for the appellant do not claim otherwise. Their contention, if we understand them, is that there must be an adjudication by some competent court that the plaintiff had the requisite knowledge, before the property can be seized. This is not the law, but such fact must appear before the plaintiff can be deprived of his property, or its value; it being sufficient if he has had a day in court, and may bring an action to vindicate and enforce his rights before he can finally be deprived of his property. This action is brought for that purpose, and it is made to appear herein that the property in question is liable to be appropriated to the payment of the judgment.

AFFIRMED.

THE STATE V. TIERNEY.

Intoxicating Liquors : NUISANCE : INDICTMENT : EVIDENCE. The indictment charged the keeping of a building with the intent to sell therein, contrary to law, intoxicating liquors, and also charged actual sales therein, but not an unlawful keeping for sale. It was shown that intoxicating liquors were kept on the premises, but no sales were proved. *Held* that the evidence of keeping was improperly admitted, because there was no allegation as to that; and that, as no sales were proved, defendant could not lawfully be convicted, because there remained nothing but the keeping of the building with an unlawful, but unexecuted, intention, which is not a punishable crime. (Compare *State v. Harris*, 27 Iowa, 430.)

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, MARCH 12, 1888.

74	237
79	50
74	237
130	378

The State v. Tierney.

INDICTMENT for crime of nuisance. Verdict of guilty, and judgment against defendant for fine and costs. He appeals.

Sheean & McCarn and *J. G. McConahy*, for appellant.

A. J. Baker, Attorney General, for the State.

ROBINSON, J. — The indictment charges that defendant "did keep, use and occupy a certain building, commonly called a saloon, with intent to sell therein, contrary to law, intoxicating liquors, to-wit, whisky, beer, and other intoxicating liquors, the names of which are to the grand jury unknown, and then and there did sell the same, contrary to law." It is shown that intoxicating liquors were found on the premises, but no sales were proven. It is insisted by appellant that the crime with which he is charged is that of keeping, using and occupying a building, and in selling therein intoxicating liquors, contrary to law, and that, since no sales were shown, his conviction was illegal. It is not a crime under the statute to keep a building with intent to sell intoxicating liquors therein contrary to law. If the liquors are not manufactured or sold, they must be kept on the premises, to constitute the offense of nuisance under the statute, and this fact must be alleged in the indictment. *State v. Hass*, 22 Iowa, 193. In this case, the indictment does not charge the keeping for sale, but the selling, of intoxicating liquors. The crime in each case is the same, but the particular circumstances necessary to constitute a complete offense are different; hence they must be charged in the indictment with directness and certainty. Code, sec. 4298. It follows that if not so charged they cannot be proven. In *State v. Harris*, 27 Iowa, 430, an indictment substantially like the one in controversy was considered, and this court condemned an instruction which charged, in effect, that the crime alleged would be established by proving the keeping of the building with the intent of

Cadwell v. Dullaghan.

owning, keeping and selling therein intoxicating liquors, contrary to law, on the ground that it made punishable an unexecuted intention or an incomplete act. The cases we have cited seem to us decisive of the questions involved in this appeal. The case is, therefore,

REVERSED.

CADWELL V. DULLAGHAN.

74	239
119	125

1. **Judgment: EVIDENCE OF RENDITION AND TERMS OF.** Parol evidence is not admissible to establish that a judgment was rendered, nor to prove its terms.
2. ——— : **PARTY IN INTEREST : EVIDENCE.** Where it was material to determine the rights between the parties, it was competent for plaintiff to testify that, by agreement between himself and defendant, a certain action was brought in his name for the accommodation of defendant, and that he (plaintiff) had no interest in the subject-matter thereof.

Appeal from Harrison District Court.—HON. G. W. WAKEFIELD, Judge.

FILED, MARCH 12, 1888.

ACTION to recover for money advanced by plaintiff in payment of taxes for defendant. The defendant pleaded a counter-claim. There was a judgment upon a verdict for defendant, from which he appeals.

L. R. Bolter & Sons, for appellant.

Joe H. Smith, for appellee.

BECK, J.—The answer of defendant denies the plaintiff's petition, and sets up as a counter-claim that he sold and conveyed to plaintiff certain land, in payment for which plaintiff assumed the payment of certain mortgages thereon, and delivered to defendant certain personal property, and conveyed to him certain real estate. The agreed values thereof did not equal

Cadwell v. Dullaghan.

the price of the land conveyed to plaintiff by defendant, but left a balance due him of two hundred and fifty dollars which he now seeks to recover upon his counter-claim. The contention in the case involves the question of the payment of this two hundred and fifty dollars. Plaintiff insists that it was paid by a mortgage executed by defendant upon lots purchased by him of plaintiff, which were reckoned as a part of the consideration for the land purchased of defendant. These lots were conveyed by defendant to one Evans, subject to the mortgage to plaintiff. Evans executed a mortgage on the lots to secure the purchase price, or a part of it. This mortgage was by the defendant transferred to one King. Before the commencement of this action the plaintiff brought an action to foreclose the mortgage executed by defendant, and a decree of foreclosure was entered therein. King brought an action against plaintiff to enjoin the enforcement of the decree of foreclosure on the ground that the mortgage had been paid. This case appears to have been tried, but no decree therein was entered of record. This statement of facts will serve to make intelligible the rulings of the court complained of by defendant, which we will now proceed to consider.

I. King was a witness on the part of plaintiff, and was permitted to testify, against defendant's objection, to the finding of the court, and the decree rendered in the action brought by him. He testified that the court found that the note and mortgage had been paid, and the decree of foreclosure was, therefore, void, and that the decree rendered in the case declared that the decree of foreclosure in the action brought by plaintiff be set aside. The evidence undoubtedly was to the prejudice of defendant. If the mortgage had been paid, the inference could be drawn that it was reckoned as a part of the consideration for the purchase of the land, and was discharged in that way. The evidence thus supported plaintiff's theory. Defendant insists that the two hundred and fifty dollars remains unpaid. If the mortgage remains unpaid, this

1. JUDGMENT :
evidence of
rendition and
terms of.

 Cadwell v. Dullaghan.

two hundred and fifty dollars could not have been paid by its satisfaction. It is plain that this evidence may have had weight in the minds of the jury, and influenced their finding on the issue. The evidence is clearly incompetent, for the reason that it is intended to show the judgment of a court by oral proof thereof, which of course cannot be done. It is not the case of evidence of a lost or destroyed record, as no evidence to establish such a foundation for its admission was introduced. On the contrary, it is shown that no judgment was in fact entered of record. So the admission of the evidence is in fact an attempt, not only to show by oral testimony a judgment, but also that the judgment was rendered by the court. It should have been excluded.

II. The plaintiff was permitted to testify that the action to foreclose the mortgage was brought in his name, under an agreement with defendant, to the
 2. —: party in
 interest: evi-
 dence. end that the property which he had conveyed to Evans should be held subject to the debt.

The witness testified that he consented to this for defendant's accommodation, and that he had no actual interest in the note and mortgage. We know of no principle of the law which will forbid plaintiff from proving the contract between himself and defendant, and all the facts connected with the transaction. As between the parties, no estoppel is raised. The testimony simply shows that plaintiff was acting as a trustee for defendant, who was to take all the benefits of the action. The transaction is not of unusual character, and is certainly not forbidden by the law. Plaintiff, as between himself and defendant, may show this agreement, and all things done in accord with it. Defendant's objection to the evidence cannot be sustained. Other objections need not be considered. They are mainly directed to rulings upon the admission of evidence, which will not probably occur again.

For the error pointed out in the first point of this opinion the judgment of the district court is

REVERSED.

Koltze v. Messenbrink.

KOLTZE V. MESSENBRINK.

1. **Appeal : AMOUNT IN CONTROVERSY.** Where the petition claimed to recover \$94.70 and interest from a certain date, and the interest from that date to the date of judgment swelled the amount to more than one hundred dollars, *held* that the petition claimed more than one hundred dollars, and that the judgment was reviewable on appeal without a certificate.
2. **Evidence : COMPETENT THOUGH WEAK.** Where the only witnesses as to the issue of payment were plaintiff and defendant, and one affirmed and the other denied, *held* that corroborative evidence, however weak, was competent and relevant. (See opinion for illustration).

Appeal from Crawford District Court.—HON. J. P. CONNER, Judge.

FILED, MARCH 12, 1888.

ACTION to recover for money loaned. There was a judgment on a verdict for defendant. Plaintiff appeals.

R. Shaw Van and Duffie & Wright, for appellant.

Shaw & Kuehnle, for appellee.

BECK, J.—I. The petition claims to recover \$94.70 and interest from a date named. The plaintiff was entitled to recover, in addition to the sum named, interest due at the rendition of the judgment, and the petition is to be taken as claiming a judgment for that amount. When the judgment was rendered, plaintiff was entitled to recover more than one hundred dollars. The pleadings, therefore, show the amount in controversy to be more than one hundred dollars. An appeal is, therefore, authorized without a certificate as to the questions of law to be determined here, which was given by the judge of the district court. The certificate will not be regarded, but the case will be considered as though no certificate had been given.

1. **APPEAL:**
amount in
controversy.

Koltze v. Messenbrink.

II. The defendant admits that he borrowed the money, but alleges that he paid it. He was permitted to show that the money borrowed by him belonged to the funds of a school district of which plaintiff was treasurer; that plaintiff borrowed from a bank one hundred dollars, which he said was to be used to take the place of the money loaned to the defendant; and that about the time the money was paid, as shown by the defendant's evidence, plaintiff paid the money borrowed from the bank. It is insisted by plaintiff that this evidence should have been excluded, for the reason that it was incompetent and irrelevant. The defendant testified that he paid the plaintiff the money borrowed. The plaintiff in his evidence denies the payment. The two were the only witnesses giving direct evidence on the point in dispute. Each depended upon circumstances to corroborate his testimony. We think the evidence complained of tends to support defendant's testimony; it is, therefore, competent and relevant. The circumstances, considered with the statement made by plaintiff, that he borrowed of the bank money to take the place of the sum loaned to defendant, tend to show that plaintiff used the money paid him by defendant in discharge of his note to the bank. It may be of little weight, but its competency cannot be doubted. Of course, the facts that the money borrowed was held by plaintiff as a school officer, and that he borrowed of the bank, and paid it about the time defendant testifies he made the payment, considered separately, may throw no light on the transaction, but considered together, in the absence of explanation, would raise the inference that plaintiff had received payment from defendant about the time he paid the bank. Nothing would be more natural than for him to so arrange as to make the money he received from defendant in this way take the place of the school money loaned to defendant.

III. The plaintiff complains of the admission of evidence showing that defendant, in a conversation with plaintiff, had to arrange the controversy, offered to take an oath that he paid the money.

Reed v. Douglas.

We are unable to discover any such evidence in the abstract introduced by defendant. The objection is, therefore, unsupported by the record.

IV. It is insisted that the verdict is in conflict with the evidence. All that need be said on this point is that the evidence is conflicting, and the verdict is not so without support in the evidence as to authorize us to reverse the judgment.

These considerations dispose of all questions in the case. The judgment of the district court is

AFFIRMED.

REED V. DOUGLAS.

Former Adjudication : HOW FAR BINDING : PRIVIES. In an action by plaintiff against T., to set aside tax deeds and quiet his title, he alleged ownership in himself, and that allegation was denied in the answer. Judgment was rendered according to the prayer of the petition, but plaintiff was required by the judgment to pay to T. the amount of the taxes which he had paid on the land, and plaintiff paid the same. Before the judgment was rendered, T. became possessed of the same claim of title which defendant in this case asserts against plaintiff, and he afterwards conveyed the land by warranty deed to defendant herein. *Held* that, by the judgment against T., not only he, but defendant herein as his privy, was estopped from either asserting title in himself, or denying plaintiff's ownership of the property; the rule being that a judgment operates as an estoppel upon parties and privies, not only as to all matters in issue, but as to all controverted points upon which the verdict or finding was rendered, and as to all defenses which might have been pleaded. (See cases cited in the opinion.)

Appeal from Madison District Court.—HON. J. H. HENDERSON, Judge.

FILED, MARCH 12, 1888.

ACTION in equity to quiet the title to certain real estate. The judgment below was for plaintiff, and defendant appeals.

Reed v. Douglas.

Ruby & Wilkin, for appellant.

J. B. Westfall and *V. Wainwright*, for appellee.

REED, J.—On the twentieth of November, 1871, Hannah J. Stanton acquired title to the property in question by conveyance from David Stanton, her husband. On the twenty-seventh of April following, she and her husband executed a mortgage on the property to Dennis & Keyes to secure an indebtedness of \$408.30. Plaintiff afterwards became the owner of that note and mortgage, and in 1876 he brought suit thereon in the Madison circuit court, and recovered a judgment for the amount of the indebtedness, and for the foreclosure of the mortgage. On the tenth of October, 1872, the treasurer of the county executed to John McLeod a tax deed of the premises, under a sale for delinquent taxes, and on the twelfth of the same month McLeod conveyed the premises to Francis Davis. On the twentieth of September, 1876, the Stantons executed to plaintiff a quit-claim deed, and on the twelfth of December, 1876, Davis executed to him a like conveyance. Those conveyances were intended to cover the property in question, but the description was defective, and on the tenth of February, 1880, Davis executed a second deed, intended to correct the mistake, but the description in that conveyance of the property was also defective. These conveyances were executed in pursuance of an agreement between Stanton and plaintiff, whereby the latter was to accept the premises in satisfaction of the debt secured by the Dennis & Keyes mortgage. On the fifteenth of September, 1875, Layton Jay recovered a judgment against David Stanton in the circuit court for \$394.33, on which execution issued August 14, 1876, which was levied on the property, and the same was sold at sheriff's sale, on the twenty-seventh of September following, to James Tumilty, to whom the sheriff executed a deed November 22; 1877, and on the twenty-fourth of February, 1880, Tumilty executed a conveyance

Reed v. Douglas.

to J. R. Thompson, who, on the eighth of March, 1886, gave a warranty deed to defendant. Davis and Stanton also, on the twenty-sixth of January, 1886, executed a quit-claim deed of the premises to Thompson. On the third of March, 1877, and the twenty-eighth of January, 1879, Thompson also obtained tax deeds of the property under sales for delinquent taxes. Plaintiff brought an action in the district court against Thompson to cancel those deeds and quiet in him the title to the property. Judgment was entered in that action on the twenty-seventh of February, 1880, quieting plaintiff's title, but establishing a lien on the property for the amount of the taxes paid by Thompson, and providing for a sale on special execution for the satisfaction of the lien. Plaintiff, however, subsequently discharged it by paying the amount found to be due. Defendant alleged that he was an innocent purchaser for value. Also that the agreement between plaintiff and Stanton, under which the conveyance from Davis and Stanton to plaintiff was executed, was that plaintiff, as part of the consideration, was to pay the Layton Jay judgment against Stanton, and that the deeds were deposited with a third party in escrow until that agreement should be performed, but that plaintiff subsequently obtained possession of them, and asserted title under them, refusing at the same time to perform the agreement. He also alleged that Davis held the title to the property in trust for Stanton, who was the real owner thereof at the time of the execution sale to Tumilty; and in a cross-petition, alleging these facts, he prayed that his title be quieted. Plaintiff, in his reply, pleaded the judgment rendered in the action against Thompson in bar, alleging that defendant is now estopped by that adjudication from either asserting title in himself or denying plaintiff's ownership of the property.

We are of the opinion that the plea of estoppel should be sustained. The relief demanded by plaintiff in the action against Thompson was the setting aside of the tax deeds and the quieting of his title to the property. His ownership was necessarily drawn in question;

Reed v. Douglas.

for, unless he was the owner, he was entitled to no relief in the action. He alleged in his petition that he was the absolute owner of the property, and that allegation was denied in the answer. The judgment, then, necessarily determines not only that the tax deeds were invalid, but that plaintiff was the owner of the property. A judgment operates as an estoppel not only as to all matters in issue, but as to all points controverted upon which the verdict or finding was rendered. *Cromwell v. County of Sac*, 94 U. S. 351; *Haight v. City of Keokuk*, 4 Iowa, 199; *Delany v. Reade*, 4 Iowa, 292; *Shirland v. Union Nat. Bank*, 65 Iowa, 96. It will be observed that the conveyance from Tumilty to Thompson was executed pending the action, so that the latter could have pleaded the same claim of title in that action which defendant asserts in this. It makes no difference that the conveyance was after the issue was joined, for under our system of pleading he would have been permitted to set up the claim, by proper amendment, at any time before the judgment was entered. Another consideration quite as conclusive of the question grows out of the fact that plaintiff was required by the judgment to pay the amount of the tax which Thompson had paid upon the land. That provision of the judgment was favorable to Thompson, and he has had the benefit of it; and neither he nor his privies will now be permitted to assert a claim which he owned and might have asserted in the former action, and which, if valid, would not only have defeated any recovery by plaintiff, but would also have prevented the establishment of the right which Thompson secured by the judgment.

AFFIRMED.

Asbach v. The Chicago, B. & Q. Ry. Co.

ASBACH V. THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

1. **Evidence: CIRCUMSTANTIAL: WHAT NECESSARY.** A theory cannot be said to be established by circumstantial evidence, even in a civil case, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory. (See opinion for illustration.)
2. **Railroads: INJURY TO STOCK FROM WANT OF FENCE: LIABILITY.** Under the statute (Code, sec. 1289), a railroad company is liable for injury to stock on its right of way from the want of a fence, only when such want, in connection with some act of the company, is the proximate cause of the injury (compare *Young v. St. Louis K., C. & N. Ry. Co.*, 44 Iowa, 172); and in this case no such act is shown.
3. ———: ———: **NEGLIGENCE NOT INVOLVED.** In an action for injury to stock, where the petition set up merely that the injury was caused by the want of a fence, *held* that plaintiff was not entitled to have the question of general negligence adjudicated.

Appeal from Decatur District Court.—HON. JOHN W. HARVEY, Judge.

FILED, MARCH 12, 1888.

ACTION for the recovery of double the value of a horse which plaintiff alleges was killed on defendant's railroad at a point where it had the right to fence its track, but where it had neglected to fence the same. The cause was tried to the court without the intervention of a jury, and judgment was entered for plaintiff. Defendant appeals.

T. M. Stuart, for appellant.

Bullock & Hoffman, for appellee.

74	248
80	622

74	248
82	876

74	248
83	491

74	248
85	175

74	248
86	102

74	248
87	279
87	800

74	248
90	754

74	248
98	218
98	575
99	145

74	248
115	187
115	189

74	248
121	180

74	248
129	8
129	348
129	638
130	573

74	248
134	740

74	248
136	419

74	248
138	185
138	570

74	248
141	523

74	248
143	580

REED, J.—The main question in the case is whether the judgment is supported by the evidence. It is undisputed that the animal in question was killed while running at large by falling from a bridge on defendant's railroad, and that the track at that point was not fenced. None of the witnesses claim to have seen the accident, and the exact time when it occurred cannot be determined from the testimony. The engineers who were employed on that part of the road were examined, and each testified in effect that the animal was not struck or thrown from the bridge by his engine, and that he did not, at any time near the date when it was found dead beside the bridge, see it upon the track or bridge. It was also proven that all the trains at that time passed the point in question by daylight. Plaintiff claims, however, to have established certain circumstances which lead reasonably to the conclusion, as she claims, that the animal, being frightened by an approaching train, ran upon the bridge until it fell upon the ties, and, in struggling to arise, it fell to the ground below, and was killed. Unless this theory as to the cause of the injury can be maintained, the judgment cannot be upheld, for there is not only no evidence that the animal was struck and thrown from the bridge by a passing train, but there is positive evidence to the contrary, and no effort was made to impair the credit of the witnesses who gave that testimony; and when we look into the testimony relied upon to establish the theory, we think it utterly fails to establish it. The circumstances relied upon are that the animal was exceedingly nervous, and was always liable to be frightened by a moving train or locomotive, and that it was with great difficulty that it could ever be driven upon or about a railroad track; that a train was stopped near the bridge on the evening of the first of August, that being two or three days before plaintiff learned of the injury; and that a witness who, on a day near that date, passed near the bridge at three o'clock p. m., and again at a later hour, saw the horse lying dead by the bridge on his return, but did not see it when he passed the first

Asbach v. The Chicago, B. & Q. Ry. Co.

time. The evidence of the stopping of the train is exceedingly unsatisfactory, none of the witnesses having seen it stop. They were all more than a mile from the bridge at the time, and they judged that it stopped from the noise that they heard; but, if it should be conceded that it did stop at the time alleged, there is absolutely no connection between that circumstance and the death of the animal, or, at least, none is shown. The witness who first saw it after the injury did not pretend to fix the date when he saw it. The fact that he saw it at that hour in the day is of no materiality at all, unless the circumstance happened on the evening on which the train was stopped; and whether it did happen on that evening is a matter of mere conjecture. A theory cannot be

1. EVIDENCE:
circumstan-
tial: what
necessary.

said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well-settled rule, and it is manifest that under it plaintiff's theory is not established. The facts relied upon to prove it are quite as consistent with the theory that the animal went upon the bridge of his own volition, or that he was frightened by something else than a train, and ran

2. RAILROADS:
injury to
stock from
want of
fence: lia-
bility.

upon it, as with it. Plaintiff, then, has not shown the cause of the injury. We have held that liability for an injury of this kind attaches, under the statute (Code, sec. 1289), when the want of a fence, in connection with some act of the defendant, is the proximate cause of the injury. *Young v. St. Louis, K. C. & N. Ry. Co.*, 44 Iowa, 172.

Counsel for plaintiff insist, however, that there is a liability independent of the statute, and that, if the bridge was so constructed or situated as to be dangerous to stock running at large, it was an act of negligence to leave it in that

3. —: —:
negligence
not involved.

Goodnow v. Burrows.

condition, and that defendant is liable on that ground. But it is sufficient to say that that question does not properly arise in the case. Plaintiff did not seek to recover on that ground. She made no allegation of negligence in her petition, but set up merely that the injury was caused by the want of a fence; and she is not, under that allegation, entitled to have the question of general negligence adjudicated.

REVERSED.

GOODNOW V. BURROWS *et al.**

1. **Former Adjudication: RECOVERY OF TAXES PAID BY MISTAKE.** (*Goodnow v. Litchfield*, 59 Iowa, 226, followed; *Goodnow v. Stryker*, 61 Iowa, 261, distinguished.)
2. ——— : **BY JUDGMENT IN FEDERAL COURT: JURISDICTION UPON REMOVAL OF CAUSE: ONLY PART OF DEFENDANTS NON-RESIDENTS.** Plaintiff's assignor, a corporation resident of Iowa, brought an action in an Iowa court against another corporation resident of Iowa, and several non-residents, including the defendant herein. Several of the non-resident defendants, not including the defendant herein, procured a removal of the cause to the circuit court of the United States. After such removal, the defendant herein, with the consent of the plaintiff in that case, and upon a finding of the federal circuit court that he, by reason of his non-residence in Iowa, was entitled to a removal of the cause, was allowed to appear and answer in that court, and, upon a trial of the issues joined, the very issue involved in this case was adjudicated against plaintiff's assignor; and, upon appeal to the supreme court of the United States, the judgment was affirmed. The resident defendant in that case did not petition for a removal of the cause. Plaintiff herein now insists that that judgment is not binding upon him, on the ground that the federal court had no jurisdiction, because the plaintiff and principal defendant in that case were both residents of Iowa, and, therefore, the right of removal did not exist. But *held*—

[*NOTE.—This case and the next one involve substantially the same question, to-wit, the question of *res adjudicata*. On that point a rehearing was granted in each case, but only one supplemental opinion was filed, and that was in the case which follows. That opinion, however, applies equally to both cases, and should be read in connection with the opinion in this case.]

Goodnow v. Burrows.

- (1) That the right of removal did exist as to the non-resident defendants, if the cause between plaintiff and them was such that it could be determined without the presence of the resident defendant; and
- (2) That, whether the cause was such or not, the statute governing the right of removal is a federal statute, and its construction by the federal courts is binding upon the state courts; and, since the federal court expressly found that the cause was rightly removed as to the defendant herein, and the plaintiff in that case consented in that court to a trial and determination of the cause as between it and the defendant herein, its assignee, the plaintiff herein, is bound by the judgment in that case.
- (3) That it is immaterial, so far as the question of former adjudication is concerned, whether the decision of the federal court as to the removability of the case was right or wrong; and if the resident defendant followed the case to the federal courts, and, by consent of the plaintiff, had its rights adjudicated there, with or without jurisdiction, that, also, is immaterial to the point herein decided.

Appeal from Webster District Court.

FILED, APRIL 22, 1885.

[REFILED, MARCH 12, 1888.]

ACTION in equity to recover taxes under the same circumstances substantially as stated in *Goodnow v. Moulton*, 51 Iowa, 555. There was a decree for the plaintiff, and the defendants appeal.

Nourse & Kauffman, for appellants.

George Crane, for appellee.

SEEVERS, J.—I. The defendants pleaded as a defense a former adjudication, and rely on *Homestead Co. v. Valley Ry. Co.*, 17 Wall. 153, to establish it, and their counsel insist that this case comes within and is governed by *Goodnow v. Litchfield*, 59 Iowa, 226. On the other hand, counsel for the appellee insists that the rule established in *Goodnow v. Stryker*, 61 Iowa, 261, is applicable, and that this case must be determined in accordance therewith. We deem it sufficient to say

Goodnow v. Burrows.

that this case, in every respect, is like that of *Goodnow v. Litchfield*, and that the plea of former adjudication has undoubtedly been established, unless this case is governed by, and must be determined in accord with, *Goodnow v. Stryker*. In this last case, Webster county filed a petition and stated that the taxes had never been paid, and that the same were due the county. To avoid a recovery by the county, the defendant pleaded that the taxes had been paid by the plaintiff's assignor, and it was thought by the court that the adoption by defendant of such payments for the purpose of escaping liability to the county should be regarded as an adoption of the payment as between the plaintiff and defendant, and, therefore, a right of action had arisen since the former adjudication. We have no occasion to either affirm or deny the correctness of the rule established in that case, for the reason that it does not appear that Webster county is a party to this action, and there is no controversy, in fact, as to the payment of the taxes.

This action was brought to recover the taxes for 1861, 1862 and 1863, which the petition states were paid to Webster county by the Dubuque & Sioux City Railroad Company, and that said company assigned and transferred its claim to the plaintiff. The defendants in their answer denied that the taxes were paid by the railroad company, but stated that, if any payment of said taxes was made, the same was made by a corporation known as the "Iowa Homestead Company," and that whatever taxes were so paid were paid voluntarily by the party paying the same, and that no right or cause of action existed against the defendants on account thereof. Clearly, we think, the defendants, under the facts above stated, cannot be said to have adopted the payments of the taxes made by plaintiff's assignor in order to escape liability to another party. There is no claim or pretense in this case that the defendants were or could be made liable to Webster county. The defendants, in substance, pleaded that the payment of the taxes had been voluntarily or officiously made, and, therefore, no right of action existed in

Goodnow v. Burrows.

favor of the plaintiff against the defendants. This question was determined in *Goodnow v. Litchfield*, before cited, and we adhere thereto.

II. Counsel for the appellee contends that the case in 17 Wall. 153, before cited, cannot be regarded as an adjudication, because the supreme court of the United States did not have jurisdiction, and, therefore, the judgment is void, and not binding on the plaintiff or those under whom he claims. The *Homestead* case was originally commenced in the state courts against the Des Moines Navigation & Railroad Company, Roswell S. Burrows and others. The navigation company was, in one sense, the principal defendant, and both it and the plaintiff are corporations organized under the laws of Iowa, and, therefore, both residents of the same state. It will be conceded as to the corporations, plaintiff and defendant, that the right of removal from the state to the federal court did not exist; but it was stated in the petition that the navigation company had conveyed a portion of the lands in controversy to Burrows and others, who were made defendants, and who were non-residents, and relief was asked against them. Three of said defendants made application for a removal of the cause to the federal court. R. S. Burrows, under whom the defendants claim, was not one of the defendants who applied for such removal. The state court seems to have made two orders for the removal of the cause to the federal court; one on October 13, 1868, and the other three days thereafter. There is some doubt whether the removal was ordered as to all the defendants, or only as to those who had asked that it be made. It will, however, be conceded that the order of the state court included the latter only, and this was assumed by the circuit court of the United States. This appears from an order made by said circuit court in May, 1870, where such fact is recited, and it is stated in said order that, it appearing that said Burrows and others were non-residents, and that they held under the same title and right as the defendants who had obtained the order of removal, and the plaintiff consenting thereto, it was

Goodnow v. Burrows.

ordered that the cause as to all the defendants be transferred to the federal court, and thereafter the cause, without objection, was tried and determined in the circuit court of the United States. The plaintiff, having been defeated, appealed to the supreme court of the United States, and the decree of the circuit court was affirmed. 17 Wall. 153.

We understand counsel to claim that, as the right of removal did not exist as to the plaintiff and corporation defendant, because they were both residents of the state of Iowa, the federal court did not have jurisdiction, and that its judgment is void, although all parties consented that the cause should be tried and determined by said court. Counsel cites a large number of authorities which, he claims, support his position; but we think they are clearly distinguishable, because the facts are materially different.

It will be conceded, for the purposes of this case, that the state court erred in ordering a removal as to any of the defendants, because all of them were not entitled thereto. But no appeal was taken from such order, nor was the federal court asked to remand the cause to the state court. The federal court assumed and took jurisdiction with the consent of all the parties to the action. The jurisdiction of the federal courts depends upon residence, and the amount in controversy. Ordinarily the subject-matter is within the jurisdiction of such courts, and in the case under consideration the federal court had undoubted jurisdiction, except as it might be affected by the question of citizenship.

Now, as we have seen, the court, with the consent of the plaintiff, under whom the plaintiff in this action claims, assumed and took jurisdiction of the action and all of the parties without any objection submitted thereto. The judgment in such case as to the parties and those claiming under them cannot be said to be void. Clearly, it seems to us that the homestead company, after invoking or consenting to the jurisdiction of the federal courts, and consenting that they should hear and determine the cause, should be estopped from now

Goodnow v. Burrows.

claiming that the judgment is void because the court did not have jurisdiction. The question of jurisdiction relates to the parties, and not to the subject-matter of the action ; and if the parties make no objection, and consent that the court should determine the controversy, we think they are bound thereby, although the court is one of limited jurisdiction, provided there was jurisdiction of the subject-matter.

III. It is objected by the appellee that the evidence upon which the case was tried in the district court is not properly and sufficiently identified by the statement contained in the abstract. Conceding this to be so, we think appellants have filed a paper which does sufficiently identify the evidence, and which shows that the evidence upon which the case was tried in the district court is in the record before this court.

REVERSED.

[See next case for supplemental opinion.]

GOODNOW V. BURROWS *et al.*

Former Adjudication : RECOVERY OF TAXES PAID. (*Goodnow v. Burrows. ante*, p. 251, followed ; *Goodnow v. Stryker*, 61 Iowa, 261, distinguished.)

Appeal from Webster District Court.

FILED, APRIL 22, 1885.

[REFILED, MARCH 12, 1888.]

THE facts in this case are precisely like those in the preceding case, except as indicated in the opinion. The court rendered a decree in favor of the plaintiff, and the defendants appeal.

Nourse & Kauffman, for appellants.

Geo. Crane, for appellee.

SEEVERS, J.—The petition states that Webster county levied taxes on certain real estate, described in the petition, which belonged to Roswell S. Burrows, for the years 1864 to 1871, inclusive, and that the Iowa Homestead Company “gave or delivered over” to said county the amount of taxes so levied, and took from the county “receipts showing the amounts so handed over.” This amounts to an allegation that the homestead company paid the taxes aforesaid, and the evidence introduced by the plaintiff so shows. The payment was absolute. No rights whatever were reserved. Webster county was made a defendant, and the relief asked is that an account be taken of the taxes paid, and that the plaintiff have a decree against Burrows for such amount in the name of the plaintiff, or in the name of Webster county, and that the same be made a lien on the lands. Webster county answered the petition, and denied the allegations of the petition, and pleaded a former adjudication. Afterwards the plaintiff filed an amendment to the petition, and stated that, at the time the taxes were “handed over” or paid to Webster county, it was agreed and understood that, if the county should receive or collect the said taxes of and from the said defendant, the county would repay the taxes to the plaintiff’s assignor, the homestead company, and that it was understood and agreed that the county would sue defendant in its own name for said taxes, and in case it should collect the same the county would pay such amount to the plaintiff’s assignor.

Afterwards, in January, 1879, the county filed a substituted answer for the pleading theretofore filed, and stated that it claimed the benefit of the suit commenced by the plaintiff, and “that said taxes have never been paid, nor any part thereof, and that defendant Burrows has never paid any taxes to said county, nor any part thereof; on the contrary, the whole thereof are due said county from said defendant.” Appropriate relief was asked. In October, 1879, the plaintiff filed an

Goodnow v. Burrows.

amendment, or additional petition, stating that R. S. Burrows had died in March, 1879, and asking that the present defendants, as his heirs or executors, be made defendants to the action. Afterwards, in May, 1880, the plaintiff filed an amendment to his petition, and thereby struck out of the petition all allegations therein as to any agreement with the county that it should bring suit for the taxes, and if it collected the same it would pay the amount so collected to plaintiff's assignor, and struck out the prayer for a decree in the name of the county for the use of the plaintiff, and asked a decree in favor of the plaintiff against the defendants. R. S. Burrows was served with notice of the action, but he never filed an answer. The present defendants appeared, and in December, 1880, they filed a petition asking the removal of the cause to the federal court, which the state court denied. Afterwards, the defendants answered the petition and pleaded a former adjudication, and denied "that the county of Webster has any interest in the suit, either as a plaintiff or defendant, but aver that the taxes assessed against the real estate described in the plaintiff's petition have been fully paid, and the lien thereof fully discharged." The defendants admitted the levy of the taxes, and that the homestead company paid the same, but stated that such payments were voluntary.

Counsel for appellee insists that this case comes within the rule established in *Goodnow v. Stryker*, 61 Iowa, 261, and for the purpose of determining this single question we have stated fully the material portions of the pleadings, for the reason that they are somewhat different from those in the preceding case. The amended answer filed by Webster county should possibly be treated as a cross-petition. To it, however, no answer was filed, nor was any default taken, and when the cause was tried the county did not appear. The record discloses the fact that the trial was wholly between the plaintiff and the defendants. The decree settles their rights only. It, therefore, clearly appears that whatever Webster county may have at one time claimed was

Goodnow v. Burrows.

abandoned, and the plaintiff clearly indicated, by the last pleading filed by him, that he also abandoned any and all relief based on any rights the county had. Besides this, the plaintiff alleged in the petition that the homestead company had paid the taxes to the county, and this was admitted by the defendants in their answer. The only issues, therefore, in the case were whether the payments were voluntary, and the former adjudication.

It is apparent that the defendants were not required and did not avail themselves of the payments made by the homestead company to defeat the claim of the county, for the reason that the county had abandoned such claim; and as to the plaintiff, as we have said, there was no issue as to who had paid the taxes, nor was there any controversy as to such payments except as to the amount paid. This case, therefore, is not within the rule established in the *Stryker case*, above cited, and, following the foregoing case, the plea of former adjudication must be sustained, and the decision of the district court

REVERSED.

SUPPLEMENTAL OPINION.

[FILED, MARCH 12, 1888.]

ROTHROCK, J.—The foregoing opinion was filed in this cause on the twenty-second day of April, 1885. At the same time an opinion was filed in the case of *Goodnow v. Louisa C. Burrows et al.* See p. 251, *ante*. Petitions for rehearing were filed in both of the cases, and rehearings were granted. The question as to an adjudication of the plaintiff's right to recover for the taxes paid was considered in both cases. In the case against Louisa C. Burrows this question was discussed and determined in the opinion, and the opinion in the case at bar merely follows the decision in the other case. We have thought it proper to dispose of that question on rehearing in this case.

The defendants claim that all right of the plaintiff

Goodnow v. Burrows.

to recover for these taxes was adjudicated and settled against the assignor of the plaintiff in the case of *Homestead Co. v. Valley Ry. Co.*, 17 Wall. 153. The plaintiff, in answer to this claim, makes the same question now, on rehearing, as was made on the original submission of the cause, that there was no adjudication of this question, because the circuit court of the United States, before which the cause was tried, and the supreme court of the United States, in which it was disposed of upon appeal, had no jurisdiction of the suit. In order that the ruling we make upon this question may be fairly understood, it is necessary that we should refer to certain parts of the record in the case of *Homestead Co. v. Valley Ry. Co.*, *supra*. The suit was commenced in the district court of Webster county, in this state, in 1868. The Des Moines Navigation & Railroad Company was made a party defendant, and it was stated in the petition that it was a corporation created by the laws of Iowa. The names of Edwin C. Litchfield, Electus B. Litchfield, Roswell S. Burrows, and a number of others were inserted in the petition as defendants. The object of the action was to quiet the plaintiff's alleged title to what was known as the "Des Moines River Grant of Lands"; and it was alleged that the navigation and railroad company had conveyed certain parcels of the land to the persons above named. The defendants, the navigation and railroad company and Edwin C. Litchfield and Electus B. Litchfield, accepted service of an original notice in the action; and on the fifteenth day of May, 1869, Edwin C. Litchfield and Electus B. Litchfield, with John Stryker, another defendant, appeared in the district court of Webster county, and filed a petition for the removal of the cause to the circuit court of the United States, upon the ground that they were citizens of the state of New York, and the plaintiff was a citizen of the state of Iowa. An order of removal was made, of which the following is a copy: "In this cause the defendants Litchfield and Stryker come and file their affidavits, bond and petition for the transfer

Goodnow v. Burrows.

of this cause to the circuit court of the United States for the district of Iowa, under certain acts of congress of the United States; and the court being satisfied that said affidavits and petition are sufficient under said law, and said bond being approved by the court, it is ordered that this cause, as to the said defendants, be transferred to said circuit court of the United States for the district of Iowa, and the clerk is ordered to make the proper papers for said transfer." After the cause was removed, Roswell S. Burrows appeared in the circuit court of the United States, and filed his answer, in which he alleged that he was a citizen of the state of New York, and that he was the owner of lands in controversy in the action, which he specifically described, and that he acquired said lands by grant from the navigation and railroad company. Others of the defendants also filed their answers. Thereupon the circuit court entered the following order: "This action was commenced in the district court of Webster county, Iowa, at the October term of said district court. The defendants Edwin C. Litchfield, Electus B. Litchfield and John Stryker filed their affidavit, bond and petition asking the removal of this action from said district court to this court, under the provisions of the act of congress, approved March 2, 1867, entitled 'An act to amend "an act for the removal of causes in certain cases from the state courts," approved July 17, 1866.' And it appearing to said district court that said Edwin C. Litchfield, Electus B. Litchfield and John Stryker were non-residents of the state of Iowa, and residents of the state of New York, and that their application for the removal of this cause to this court is in all respects conformed to the requirements of said act of congress, the said district court, at the October term thereof, in the year 1868, made the usual order transferring and removing this cause to this court, as to the defendants Edwin C. Litchfield, Electus B. Litchfield and John Stryker; and this cause, as to said defendants, removed to this court for trial. And it appearing that the defendants Samuel G. Wolcott, Roswell S. Burrows, Wm. J. McAlpine, Richard B.

Goodnow v. Burrows.

Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy and Edward Wade are each and every one of them non-residents of the state of Iowa and district of Iowa, and, under the statute above referred to, are also entitled to a removal of this cause from the state court, and that said defendants, with the express consent and approval of the plaintiff, have appeared and answered the bill herein, and asked to be made parties defendant, and that their rights may be heard and determined in this court and on the trial of this action; and it further appearing to this court that the defendants so asking to be made parties claim and hold under the same title as the defendants Edwin C. Litchfield, Electus B. Litchfield and John Stryker, and that their defense is in all respects identical; with the said plaintiff consenting, it is ordered that said Samuel G. Wolcott, Wm. B. Wells, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy and Edward Wade, and each and every one of them, be made parties defendant herein; that the answer filed by said persons be taken and deemed their answer to the complainant's bill, and that by their appearance and answer herein the said persons be deemed and treated as defendants herein, and their rights in the premises adjudicated in and by this court in said action." It appears that the navigation company, defendant, also answered; but it made no application for the removal of the cause, and, in the further proceedings in the federal circuit and supreme courts, no mention is made of any reason why it was retained as a defendant. It appears, however, that it was so treated through the further progress of the case, and until the final decree in the supreme court, in which it was determined that plaintiff had no title to the lands in controversy, and that it had no right to be reimbursed for taxes paid upon the land. That decision, so far as it pertained to the right to recover for taxes, was followed by this court in *Goodnow v. Litchfield*, 59 Iowa, 226.

Counsel for the plaintiff insists that the federal

Goodnow v. Burrows.

court had no jurisdiction of the action, because the homestead company, plaintiff, and the navigation company, defendant, were both citizens of the state of Iowa. The act of congress under which the removal of the cause was ordered is as follows: "When the suit is against an alien and a citizen of the state wherein it is brought, or is by a citizen of such state against a citizen of the same and a citizen of another state, it may be so removed (from the state to the federal court), as against said alien or citizen of another state, upon the petition of such defendant, filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the state court as against the other defendants." Rev. Stat. U. S. 114. Counsel for appellee has cited a number of decisions of the supreme court of the United States, in which it was held that the federal courts had no jurisdiction of the causes removed to them from the state courts because of the want of the requisite citizenship of the parties. In all of these cases the question of jurisdiction was raised, either upon appeal or by writ of error, in the very cause in which the question was involved. We do not regard it as necessary to set out or consider these cases. It is claimed, however, that, where it appears upon the face of the record that the federal court had no jurisdiction of a cause, its judgment is void, and may be attacked collaterally. This may be conceded for the purposes of this case; but it does not meet the question under consideration. It does not follow that because the homestead company, plaintiff, and the navigation company, defendant, were both citizens of the state of Iowa, and this fact appeared upon the face of the record, that the federal court was without jurisdiction. The proposition might

Goodnow v. Burrows.

be conceded if the navigation company had been the only party defendant; but the defendants Litchfield and Stryker, who petitioned for the removal of the suit as to them, were defendants and citizens of the state of New York, and they had the right to present the question to the state court whether or not they were entitled to a removal, notwithstanding the navigation company, defendant, and the plaintiff were both citizens of Iowa. This is just what was done; at least, the state court ordered that the "cause as to the said defendants [Litchfield and Stryker] be transferred to the circuit court of the United States", and the circuit court found and determined that the cause was transferred and removed to the circuit court "as to the defendants Edwin C. Litchfield, Electus B. Litchfield and John Stryker; and this cause, as to said defendants, removed to this court [the circuit court] for trial." Afterwards, by order of the court, and with the "express consent and approval of the plaintiff", the other defendants, non-residents of the state of Iowa, including Roswell C. Burrows, appeared in the circuit court and answered, and they were admitted to defend, upon the ground that they held the lands claimed by them by the same title as the defendants upon whose petition the cause had been removed, and were also entitled to a removal of the cause from the state court. There was an express decision of the federal court that these defendants were entitled to a removal of the cause from the state to the federal court. The question was directly presented and determined by both the state and federal courts. The navigation company made no application for removal, and the right to removal as to all of the defendants was not determined. The statute under which the removal was effected does not require that all of the defendants must necessarily be citizens of a state other than that of which the plaintiff is a citizen. If there can be a final determination of the controversy, so far as concerns the non-resident defendants who petition for the removal, without the presence of the other defendants as parties, then the petitioners are entitled

Goodnow v. Burrows.

to the removal, and there was ground for holding that the action was severable. It is quite apparent that the plaintiff in that case might have brought separate actions against all of the defendants; and the navigation company, the grantor of the other defendants, was in no sense an indispensable or necessary party to an action against its grantees. But whether the action was severable or not is not for this court to determine. That was a question for the federal court. Its decision was a construction of the federal statute, as applicable to the facts of the case before it, and it is manifest that no state court is authorized to declare that the decision was erroneous. And it is entirely immaterial what became of the navigation company as a party to the action. If it followed the case, and, by consent of the plaintiff, had its rights adjudicated, that cannot affect the adjudication as between the homestead company and the defendants who were held to be entitled to the removal as to them. At the instance of the plaintiff, this court has held that the decision in the homestead case was the authoritative and binding adjudication that the defendants therein were the owners of the land which was so long in controversy. *Goodenough v. Moulton*, 51 Iowa, 555. We are asked now to hold that the federal court had no jurisdiction in that case; and of course it must follow that, having no jurisdiction, its decree was void, and neither settled the title nor the right to recover taxes paid by the parties. We must decline to take such a position. We have said that the question whether the action was severable was properly presented, and that it is immaterial, so far as the authority of this court is concerned, to determine whether it was correctly decided or not. It may be that under the case of *Shainwald v. Lewis*, 108 U. S. 158; s. c., 2 Sup. Ct. Rep. 385, and other cases cited by counsel for appellee, the decision was erroneous. On the other hand, under the case of *Barney v. Latham*, 103 U. S. 210, and other cases, it may have been correct. But we cannot go into that question. The homestead company should have made the question

The State ex rel. Braden v. Chamberlin.

in the case. The question cannot be determined by this court. The case, so far as it involves the question of whether or not the action was severable, is a law unto itself, so to speak, and cannot be controlled by other adjudged cases.

The foregoing opinion is adhered to, and the decree
REVERSED.

THE STATE *ex rel.* BRADEN V. CHAMBERLIN *et al.*

1. **Intoxicating Liquors: SALE UNDER PERMIT: INCORRECT REPORTS: MISTAKE: LIABILITY ON BOND.** In an action on a bond given to procure a permit to sell intoxicating liquors, the alleged cause of action was that the defendant made false returns to the auditor. Defendant, in an amendment to his answer, stated in substance that the reports were erroneous in several particulars, but that such errors were the result of mistakes on his part. *Held* that the amendment should have been stricken out on motion, because, in an action at law at least, the penalty of the statute cannot be avoided on the ground of mistake. (Compare *State v. McEntee*, 68 Iowa, 382; *Abbott v. Sartori*, 57 Iowa, 661).
2. **Bill of Exceptions: TIME OF FILING: EXTENSION BY AGREEMENT.** The time of filing a bill of exceptions may be extended by the stipulation of the parties filed in the case, and such agreement will be binding without the approval of the court.
3. **Appeal: WHAT EVIDENCE TO BE CERTIFIED.** Where the appellant in a law action seeks to have the judgment reversed on the ground that the court erred in dismissing the case on the evidence given and received, it is not necessary or proper to bring to this court the evidence offered but not received. (Code, sec. 2741).
4. **Intoxicating Liquors: SALES UPON PRESCRIPTIONS UNDER PERMIT: RETURN TO AUDITOR.** The statute requires one selling intoxicating liquors under a permit to return to the auditor an account of his sales made upon physicians' prescriptions, as well as other sales.

Appeal from Buchanan District Court.—HON. C. F. COUCH, Judge.

FILED, MARCH 12, 1888.

ACTION on a bond given under the provisions of section 1538 of the Code, to procure a permit for the sale of intoxicating liquors. The case was tried by the

The State ex rel. Braden v. Chamberlin.

court, and judgment entered, dismissing the case and taxing the costs to the county. Plaintiff appeals.

H. W. Holman, for appellant.

Woodward & Cook, for appellees.

ROBINSON, J.—The petition alleges that a permit to buy and sell intoxicating liquors in Buchanan county was duly issued to defendant M. A. Chamberlin, and that to obtain the same he gave a bond as required by law, executed by himself and by his co-defendants as sureties; that, during the months of January, February, March and April, 1885, the defendant Chamberlin failed to make to the auditor of Buchanan county the returns in writing required by law, and that he made a false return for each of said months. Judgment against defendants for eight hundred dollars is demanded. Defendants admit the execution of the bond and the issuing of the permit as alleged, but deny the breaches of the conditions of the bond charged, and aver that Chamberlin substantially complied with all the requirements of law for the months named.

I. Defendants filed an amendment to their answer, in which they allege, in substance and effect, that the reports for the months in question were erroneous in several particulars named, and that such errors were the result of mistakes on the part of defendant Chamberlin.

1. INTOXICATING
liquors: sale
under permit:
incorrect re-
ports: mis-
take: liability
on bond.

Plaintiff filed a motion to strike this amendment from the answer. The motion was overruled, and the correctness of that ruling is submitted for our determination. The question it raises is, whether a mistake in making the reports required by section 1537 of the Code can be pleaded and proven as a defense in an action to recover the statutory forfeiture for failure to make such reports. Section 1538 of the Code provides that “any person holding a permit either to manufacture or sell, who shall fail to make monthly returns as herein required, or within five days thereafter, or

The State ex rel. Braden v. Chamberlin.

who shall make a false return, shall forfeit for each offense the sum of one hundred dollars, to be recovered in the name of the state of Iowa, upon the relation of any citizen of the county, by civil action on his bond, with costs." The right of action under this section becomes vested upon the failure of the liquor-seller to make a return which shall comply with the statutory requirements, within the time limited. We held in *State v. McEntee*, 68 Iowa, 382, that the requirement of the statute as to time of making the return is mandatory. But we said under a former statute, which was directory only, that it was "probable that the action could not be defeated by making a report after the commencement of the action." *Abbott v. Sartori*, 57 Iowa, 661. Under the authority of these cases, it is evident that the making of a return after the date fixed by statute would constitute no defense to this action. It is the purpose of the statute to secure the making of prompt and accurate returns, as an inducement to comply with the law in regard to the sale of intoxicating liquors, and as a means of enforcing it. The right of plaintiff to recover does not depend upon the intent with which the returns in question were made, but upon their accuracy and sufficiency. This being true, it follows that defendants cannot escape liability by showing that such returns do not comply with the statute. We, therefore, conclude that the amendment should have been stricken from the answer. We do not decide that there can be no relief from a mistake made without negligence, which a court of equity might correct. That question is not involved in this case. Equitable relief is not asked, nor is any ground therefor shown.

II. The appellees claim that the evidence in this case was not made a part of the record as required by law, and, therefore, that this court cannot inquire into the merits of the controversy. It appears that judgment was rendered on the twelfth day of November, 1886. It recited that, "by agreement of the parties in open court, plaintiff is granted ninety days in which to file a

2. BILL of ex-
ceptions: time
of filing: ex-
tension by
agreement.

The State ex rel. Braden v. Chamberlin.

bill of exceptions." No bill of exceptions was filed within the ninety days named, but the attorneys of the respective parties to the suit entered into an agreement in writing, extending the time of filing the bill of exceptions to the first day of March, 1887. On that day the bill of exceptions and stipulation aforesaid were filed. It is insisted by appellees that, because the stipulation was not incorporated in the bill of exceptions nor approved by the court, it is without effect. In this view we do not concur. It was competent for the attorneys to agree to an extension of time, and when their agreement was filed it was the proper evidence of the agreement, and a part of the record of the case, Code, secs. 213 (par. 2), 3184. There was no occasion to incorporate it in the bill of exceptions, nor to have it approved by the district court. Section 2831 of the Code provides that the bill of exceptions shall be filed "during the term, or within such time thereafter as the court may fix, but in no event shall the time extend more than thirty days beyond the expiration of the term, except by consent of parties or by order of the judge." It seems to be the thought of the attorneys for appellees that the consent of the parties has no force, except as it may be approved by the court. If this be true, the extension cannot be had "by order of the judge," without the approval of the court, for the phrases, "by consent of parties," and "by order of the judge," stand in the same relation to the clause, "within such time thereafter as the court may fix." But such a construction would make a portion of the provisions under consideration practically inoperative. We do not think there is anything in the law which prevents an extension of time by agreement of parties, and hence conclude that the bill of exceptions was duly filed.

III. It is next claimed by appellees that this court cannot consider the merits of the case, because the evidence offered, but not received on the trial, was not made of record. The trial judge certified that the bill of exceptions

3. APPEAL:
What evidence
to be certified.

The State ex rel. Braden v. Chamberlin.

contains "all the evidence given and received on the trial." It is true, as a general rule, that this court cannot try a cause *de novo*, unless all the evidence offered in the district court, whether received or not, is submitted to it. But this is not an equitable action, and the appellant is not seeking a trial here, but asks us to reverse the judgment of the district court, and, as one ground for such action, claims that there was error in dismissing the case on the evidence given. That evidence is preserved by the bill of exceptions, and is before us. Section 2741 of the Code provides that no evidence shall be brought to this court, except such as may be necessary to explain any exceptions taken in the cause. The evidence offered, but rejected, is not necessary to a determination of the exception taken by the appellant; hence it should not have been brought here. Whether it was preserved or not is immaterial.

IV. The appellant insists that the district court erred in dismissing the action. We assume that it was dismissed on the theory that it was not sustained by the evidence. The defendant Chamberlin testified as follows: "I did not report sales on prescriptions. If a man came to my place and got whisky on prescription during that time, I did not put it down, even if there were no other articles with the whisky. * * * I did fill prescriptions from other physicians of clear liquors. I did that repeatedly during the four months, and in every one of those months. None of those appears in these reports." The only kind of liquors under consideration was intoxicating liquors. This evidence was not only competent, but it was unusually direct and clear. It is not claimed that sales on prescriptions were omitted from the returns by mistake, hence the court could not have refused to consider evidence of them on that ground. The sales on prescriptions were not denied by any one; hence, must be considered as fully established. That a failure to make return of such sales was a violation of law cannot be questioned. The fact that the liquors sold on prescription may have been

4. INTOXICATING
liquors: sales
upon pre-
scriptions un-
der permit:
return to au-
ditor.

The State v. Mullenhoff.

intended for use as medicine did not, in any manner, affect their character nor release Chamberlin from the duty of making return of such sales. *State v. Laffer*, 38 Iowa, 425. It is proper to say that the attorneys for appellees do not claim that the failure to return the sales in question was not a violation of law. The evidence submitted fully establishes the right of plaintiff to recover judgment; hence, it was error in the court to dismiss the action.

REVERSED.

THE STATE V. MULLENHOFF.

1. **Intoxicating Liquors : PERMIT TO SELL TERMINATED BY REPEAL OF LAW.** The right of a pharmacist to sell intoxicating liquors under a permit is not an accrued right, within the meaning of Code, section forty-five, paragraph one, and such right, granted under the statutes in force prior to the enactment of chapter eighty-three, Laws of 1886, ceased upon the taking effect of that chapter, which repealed prior enactments relating to permits to pharmacists. (See *State v. Courtney*, 78 Iowa, 619.)
2. ——— : **UNLAWFUL SALE UNDER MISTAKEN BELIEF.** The fact that defendant made the unlawful sales of liquors under the honest but mistaken belief that a permit formerly granted him was still in force, will not protect him from criminal liability. (*State v. Hayes*, 67 Iowa, 27, *distinguished*.)
3. ——— : **SALE BY NON-REGISTERED PHARMACIST UNDER PERMIT TO FIRM.** A non-registered pharmacist, who was the partner of a registered one, had no right, under chapter seventy-five, Laws of 1880, to sell intoxicating liquors under a permit held by the firm, except as an aid to, and under the supervision of, a registered pharmacist.
4. ——— : **CRIMINAL LIABILITY OF PHARMACIST.** The fact that one is a pharmacist and holds a permit to sell intoxicating liquors will not protect him from prosecution for nuisance, if he makes unlawful sales in his pharmacy.

74	271
101	303
74	271
103	116
74	271
104	493
74	271
108	468
74	271
110	415
74	271
130	47
74	271
132	697

The State v. Mullenhoff.

5. **Criminal Law : EVIDENCE BEFORE GRAND JURY NOT MINUTED : DOCUMENTS.** It is not necessary that documentary evidence used before the grand jury be set out or noted in the minutes of the evidence. And where a witness before the grand jury, as shown by the minutes, testifies only that he is the officer having legal custody of such documents, he may, upon the trial, after testifying that he is such officer, produce and identify such documents ; such identification not being independent evidence, but connected with the documents themselves.

Appeal from Montgomery District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, MARCH 12, 1888.

THE defendant was indicted and convicted of maintaining a nuisance by keeping a place for the sale of intoxicating liquors in violation of law, and he appeals to this court.

Smith McPherson, for appellant.

A. J. Baker, Attorney General, for the State.

BECK, J.—I. The defendant was a member of a firm doing business as druggists, composed of C. W. Hine, a registered pharmacist, and himself. He was not a registered pharmacist. The firm held a permit to sell intoxicating liquors under the law in force prior to the taking effect of chapter eighty-three, Acts Twenty-first General Assembly. When that statute took effect, and the sales for which defendant is indicted were made, the time had not expired for which the permit was limited according to its terms. Subsequent to making these sales, Hine, defendant's partner, received a permit under chapter eighty-three, Acts Twenty-first General Assembly. Counsel insists that defendant's right to sell under the first permit was not affected by the repeal of the statute under which it was issued. To support this position he relies upon Code, section forty-five, paragraph one, which declares that "the repeal of a statute does not * * * affect any right which has accrued * * *

1. INTOXICATING
liquors: per-
mit to sell
terminated by
repeal of law.

The State v. Mullenhoff.

under, or by virtue of, the statute repealed." The right contemplated by the section pertains to any property right, or person, of the citizen. The permit in question bestowed upon defendant no such right, but was rather authority conferred by the statute in the exercise of the police power of the state, which regulated the sale of intoxicating liquors. The state, by the permit, did not abandon its authority to forbid at any time the sales permitted, or change the condition upon which they may be made. If the law were otherwise, permits issued under chapter eighty-three, Acts Twenty-first General Assembly, which are indifferent as to time, would confer upon those holding them perpetual authority to sell intoxicating liquors. The district court rightly held, in the instructions, that defendant's right to sell liquor for medicinal purposes depended upon compliance with chapter eighty-three, Acts Twenty-first General Assembly.

II. The defendant asked an instruction to the jury to the effect that he could not be convicted, if in good faith he believed he had the right to sell for medicinal purposes. The honest but mistaken belief that an act is lawful will not protect one indicted therefor from punishment, if it be criminal under the statute. An instruction to this effect, asked by defendant, was rightly refused. *State v. Hayes*, 67 Iowa, 27, does not sustain the position of defendant.

III. Chapter eighty-three, Acts Twenty-first General Assembly, repeals prior enactments relating to permits to pharmacists. *State v. Courtney*, 73 Iowa, 619. The later statute must, therefore, control, and a permit issued under a prior repealed statute did not protect defendant.

IV. The court instructed the jury that defendant, who was not a registered pharmacist, had no right to sell, independently, intoxicating liquors for medicinal purposes, after the permit was issued, but was authorized to assist a registered pharmacist in selling under his

2. —: unlaw-
ful sale under
mistaken
belief.

3. —: sale by
non-regis-
tered pharma-
cist under
permit to
firm.

The State v. Mullenhoff.

“immediate personal direction and supervision.” This instruction is complained of by counsel. Chapter seventy-five, Acts Eighteenth General Assembly, forbid any one not a registered pharmacist to dispense medicine, except as an aid to, and under the supervision of, a registered pharmacist. The language of the instruction substantially accords with this restriction. The non-registered clerk may, under the law, aid the pharmacist under his supervision. This implies that the clerk shall assist the pharmacist, who shall supervise the clerk’s work. It seems to us that the pharmacist must have “immediate personal direction and supervision” of the work. The instruction, we think, is correct.

V. We understand that counsel for defendant insists that defendant can only be punished under the pharmacy statute for misdemeanor, and cannot be indicted for nuisance, under the statute forbidding the sale of intoxicating liquors. But defendant’s character as a pharmacist, and the permit given to him or his partner, would not protect him for unlawful sales. He is to be punished therefor as any other violator of the statute forbidding the sales of intoxicating liquors. *State v. Noel*, 73 Iowa, 682; *State v. Courtney*, 73 Iowa, 619.

VI. A witness testified before the grand jury, as shown by the minutes of the evidence, that he was auditor of the county. The minutes showed no other evidence given by him. He testified at the trial that he was the auditor, and produced the reports of sales made by defendant’s firm. He stated that he understood that defendant was a member of the firm of Hine & Co. Defendant objected to this witness giving his testimony, on the ground that the minutes of the evidence before the grand jury failed to set it out. The identification of the reports by the witness was not independent evidence, but connected with the reports themselves. It is not shown that these reports were not noted upon the minutes of the evidence before the grand jury. We

4. —: criminal liability of pharmacist.

5. CRIMINAL law: evidence before grand jury not minuted: documents.

Determann v. Luehrsmann.

cannot presume that they were not. Indeed, being documentary evidence, it was not necessary to set them out, or note them, in the minutes of the evidence. His statement that he understood that defendant belonged to the firm making the reports was not a disputed fact; defendant testified directly to it. No possible prejudice could have resulted to defendant from the evidence.

These views dispose of all the questions of the case. The judgment of the district court is

AFFIRMED.

DETERMANN *et al.* v. LUEHRSMANN *et al.*

1. **Unincorporated Church : TRUSTEE OF LAND FOR USE OF : REMOVAL ON PETITION OF MEMBERS.** Three out of several hundred members of an unincorporated church have no right to ask the removal of a trustee to whom property has been conveyed for the use of the church, especially where it is not shown that the property will be impaired or the rights of the beneficiaries imperiled.
2. ——— : ——— : **RIGHT TO RENTS.** In such case the trustee is entitled to the rent of the trust property.
3. **Former Adjudication : FACTS CONSTITUTING.** Where a married woman brought an action against a trustee to set aside a trust deed, but the court decreed that the deed should stand, and that the trustee should pay her a certain sum in satisfaction of the claim of herself and husband in the land, *held* that the husband was thereby estopped from bringing a subsequent action against the trustee to set aside the deed.

Appeal from Clinton Circuit Court.

FILED, MARCH 12, 1888.

ACTION in chancery to enforce a trust, to remove the trustee, and for other relief. After a trial on the merits, the plaintiffs' petition was dismissed, and they now appeal to this court.

C. W. Chase, for appellants.

P. B. Wolfe, for appellees.

Determann v. Luehrsmann.

BECK, J.—I. The petition alleges that the plaintiffs, Benedict H. Determann, Jacob Borman and Theodore Hoing, are members of “the German Catholic St. Boniface Church at Lyons,” an ecclesiastical body organized under the canons and the rules of the Catholic church, with a membership of several hundred, but is not incorporated, and cannot bring suit as an incorporation; and that, as it is impracticable to join all the members of the church, the plaintiffs bring this suit in behalf of themselves and all other members, the question involved being of common interest to all the members of the church. The petition shows that Harman Kahle, a member of the church, being seized of certain lands, desired to devote them to the use and benefit of the church of St. Boniface, and the parochial school connected therewith. But he was induced by defendant Luehrsmann, then the pastor of the church, to convey them to him; which was done, under the belief of the grantor that the church and school were the beneficiaries for whom the grantee should hold the lands in trust, and that defendant herein Mary Hoing should hold the right to the possession and use of the lands for one year after the death of the grantor. But the deed was in fact absolute, without reserving any right or interest to the church or to Mary Hoing. After the death of the grantor, defendant Luehrsmann rented the lands to defendant H. H. Monemann, claiming to own them absolutely in his own right, and not as a trustee. Subsequently, Mary Hoing commenced an action against Luehrsmann to set aside the deed, in order that she, as the devisee and heir of Kahle, might be able to convey the lands to a trustee for the benefit of the church and school, and to recover damages to which she might be entitled for being deprived of the possession and use of the lands. The action was disposed of by a decree, wherein it is declared that Luehrsmann holds the lands in trust for the church and school, and that a payment made by him to Mary Hoing of five hundred and fifty dollars should operate as satisfaction of the claim of herself and her husband, Theodore Hoing, who is a

Determann v. Luehrsmann.

plaintiff in this suit. The decree provides that for this sum, and the further sum of \$268.80 paid for attorney fees, costs and expenses in the defense of the action, he shall have a lien upon the lands. The petition shows that, in the action wherein the decree was rendered, certain persons, members of the church, intervened, setting up that they were trustees of the church; but that they in fact had no authority from the church or its members so to do. It is alleged that the decree is not, therefore, binding upon the church and its members. It is further alleged that Luehrsmann has permitted the lands "to run down and become impoverished, and the fences to be destroyed, and has cut about ten cords of wood each year, and converted the same to his own use." Upon this ground, and for the further reason alleged, that he is an improper person to discharge the duties of the trust, it is prayed in the petition that he be removed, and a suitable person be appointed in his place. Mary Hoing is made a defendant, and H. H. Monemann, to whom Luehrsmann leased the land, is also joined as a defendant. Neither of them answered in this action. It is further prayed that, pending this action, a receiver be appointed to take charge of the land, and collect the rents, and that other appropriate relief be granted. The material allegation of the petition impeaching the validity of the deed to Luehrsmann, the former decree and the acts of Luehrsmann are denied. Other allegations of the pleadings need not be recited here. The circuit court dismissed plaintiff's petition. The decree, in addition to the order of dismissal, contains this further provision: "And the court further finds that the sum of one hundred and fifty dollars has been paid into the First National Bank of Lyons, Iowa, being the rent of the land herein involved, due January 1, 1886, and that, by stipulation of the parties hereto, such sum is to be applied under the direction of this court. Now, in accordance with such stipulation, it is hereby ordered that said sum of one hundred and fifty dollars, with the lease of said land, be paid and delivered to the defendant Luehrsmann. And it is hereby considered and

Determann v. Luehrsmann.

adjudged that said defendant Luehrsman have and recover of and from the plaintiffs the costs of this action, taxed at \$———.”

II. The defendant Luehrsmann, in his answer to the plaintiffs' petition, does not deny that the lands in question were conveyed to him in trust for the St. Boniface church and school, and in his testimony he states that the deed to him was made to secure it for that purpose. No question, therefore, arises as to the trust held by him. The plaintiffs declare that he holds a trust, and he admits it.

III. The evidence fails to show such a state of facts as authorizes the conclusion that the property will be impaired, or the interests and rights of the beneficiaries will be imperiled, before the beneficiaries, through the proper ecclesiastical officers, or through persons otherwise authorized by law, may call upon him to discharge the trust by the conveyance of the lands to a person or persons authorized to hold it for the church. These plaintiffs are three out of several hundred, and do not show that they have any other or greater rights as to the property than any other three members of the church. They have no right to direct the appointment of trustees to take and hold the lands for the church. They cannot and do not ask an accounting by Luehrsmann for money paid and received by him. We think they present in this case no grounds upon which a court of chancery can interfere to disturb the possession of the property in Luehrsmann. We need not inquire whether the beneficiaries, the church and school, or the members of the church, are estopped by the decree in the former case, or whether that decree as to the beneficiaries is to be regarded as an adjudication as to the claim of Mary Hoing, and the costs and expenses paid by Luehrsmann. These questions may probably arise when Luehrsmann is required to perform the trust, and account for the moneys received by him as trustee. These considerations lead us to the conclusion that the circuit court rightfully dismissed plaintiffs' petition.

IV. Mary Hoing and her husband, Theodore, who

 Stennett v. Hall.

is a plaintiff in this action, are surely bound by the decree in the former action.

The provision of the decree in this action requiring the money paid to the bank on the rent of the land to be delivered to Luehrsmann is correct, for the reason that he, as the trustee, has the right to all moneys arising from or pertaining to the trust.

In our opinion, the decree of the circuit court ought to be

AFFIRMED.

74	279
135	632

STENNETT *et al.*, ADM'RS, v. HALL *et al.*

HALL *et al.* v. STENNETT *et al.*

1. **Will: DISINHERITING HEIR.** Ever since the enactment of the Code of 1851, a testator in this state has had the right to dispose of his property by will as he pleased, and an heir to whom nothing is devised takes nothing.
2. ——— : **INTERPRETATION: BEQUEST TO ONE DECEASED.** The will in question, among other bequests, made the following: "(3) To my son W. forty-five dollars in excess of an equal share; said forty-five dollars is to taken E.'s share. (4) To my daughter E. fifty dollars, forty-five dollars of which is to go to W. for marble head-stone, she having had consideration in advance." E. was dead when the will was made, and the testator knew that fact. *Held* that the bequest to her was void, and that the amount thereof was to be distributed to the other heirs, except the sum of forty-five dollars, which sum W. was to expend for a head-stone for E.

Appeals from Montgomery District Court.—HON. GEO. CARSON, Judge.

FILED, MARCH 12, 1888.

ACTIONS wherein plaintiffs pray for decrees construing a will. In each case they appeal.

Smith McPherson, for appellants.

C. E. Richards, for appellees.

BECK, J.—The following will was admitted to probate:

Villisca, Iowa, September 23, 1880.

“I, Daniel Stennett, of Montgomery county, Iowa, being of sound mind and memory, do make, ordain and declare this instrument to be my will: (1) All just debts and burial expenses to be paid. (2) I bequeath and devise all my personal and real property as follows: (3) To my son, Wayne Stennett, forty-five dollars in excess of an equal share; said forty-five dollars is to taken Emma Hall's share. (4) To my daughter, Emma Hall, fifty dollars, forty-five of which is to go to Wayne Stennett for marble head-stone, she having had consideration in advance. (5) To my daughter, Eliza Harlan, an equal share, less one hundred and fifty dollars. (6) To my son, Charles Stennett, an equal share, less one hundred dollars. (7) To my son, Hugh Stennett, an equal share, less four hundred dollars. (8) To my daughter, Nancy Becknell, an equal share. (9) To my son, J. P. Stennett, an equal share, less sixty dollars. (10) To my daughter, Elizabeth Dinwiddie, an equal share. (11) I appoint Wayne and J. P. Stennett, of Montgomery county, Iowa, farmers, executors of this will. In witness whereof I have signed and sealed and published, and declare this instrument or will, at Villisca, Montgomery county, Iowa, this twenty-third September, A. D. 1880.

DANIEL STENNETT. [Seal.]”

The cases were submitted together, without other evidence than the following agreed statement of facts: “In lieu of all other evidence the following agreement is made of record, and no other evidence is competent or admissible, and the following facts are agreed to be used in evidence in each and both of said cases aforesaid: (1) Daniel Stennett died at Villisca, Montgomery county, Iowa, on the ——— day of May, 1886, and for many years preceding his death resided in said county. (2) The wife of Daniel Stennett died many years prior to death of Daniel Stennett, and he did not remarry.

Stennett v. Hall.

(3) Said Daniel Stennett left surviving him as his only heirs living the following children: Wayne, J. P., Charles and Hugh L. Stennett, and Nancy Becknell, Eliza Harlan and E. Dinwiddie, all parties to said actions aforesaid. The said D. Stennett also at one time had a daughter by name of Emma Hall, who died several years prior to the death of said D. Stennett. At one time the said Emma Hall had been married. Prior to her death she was lawfully divorced from her husband, and never remarried. She had one child and heir, and no other children, viz., E. L. Hall, a party to said actions aforesaid. (4) On the ——— day of May, 1880, said Daniel Stennett made his last will and testament, a copy of which is annexed to each of the petitions in said actions, which is made a part hereof; the original and record thereof is waived. Said will was duly and legally admitted to probate by the circuit court of said county, June 22, 1886, and duly recorded. (5) At time of making said will said Emma Hall was dead, and was then known by said D. Stennett to be dead; and said D. Stennett died seized in fee-simple or the owner of said real estate in suit, or of personal estate."

The district court entered the following findings and decree: "(1) That the clause in said will of Daniel Stennett, deceased, relating to and granting a bequest to Emma Hall, is void. (2) The court finds that said bequest to Emma Hall was made after decease of said legatee; and the court finds that said bequest was disposed of, except the sum of five dollars in the bequest to W. Stennett; the sum of twenty-five dollars thereof having been appropriated by said testator for a monument for said deceased daughter, Emma Hall, legatee in said will. The court orders the executors to proceed as follows: To the children, share and share alike, subject to the limitations contained in the will; and that said sum of twenty-five dollars appropriated to Wayne Stennett be appropriated as in said will directed for monument for said Emma Hall; and that the sum of five dollars included in said legacy to Emma Hall be disbursed with the proceeds of the estate in seven

Stennett v. Hall.

shares, share and share alike; and the executors will pay the costs of this proceeding and make due report."

II. Counsel on both sides admit, or at least do not deny, that the bequest in the fourth clause of the will is, under the facts, void. The court below found that, regarding it as a bequest to the legatee named, it is void, but as a direction to apply the sum mentioned in the clause to the purchase of a marble head-stone it is valid. We are not called upon to consider the question of the validity of the fourth clause; its invalidity being admitted.

III. But counsel for plaintiffs insist that, as it is shown that an heir of the testator is not provided for in the will, he will take such share of the estate as he would have been entitled to had no will existed, on the ground that the law will not permit an heir to be disinherited, except upon an express declaration or necessary implication to that effect, so that the contrary cannot be supposed. Counsel insist that this is the rule of the common law, and has been recognized by this court in *Lorieux v. Keller*, 5 Iowa, 196, and *Negus v. Negus*, 46 Iowa, 487. We need not inquire as to the rule of the common law, for, as we shall see, a statute of this state is to be regarded as establishing the contrary rule. We are quite sure that the cases named do not support counsel's position. Indeed, we have never before seen them cited as having that effect. In the early history of the state a statute established the rule. See Revision 1843 (Blue Book), p. 670, sec. 19. The provision was not reenacted by the Code of 1851, but was repealed therein by section 1277, which is in this language: "Any person of full age and sound mind may dispose by will of all his property, except what is sufficient to pay his debts, or what is allowed as a homestead, or otherwise given by law as privileged property, to his wife and family." This provision was reenacted in the Revision of 1860, and again in the Code of 1873. It has not been changed by any subsequent enactment. Its language, in authorizing a disposition by will of all

1. WILL: disinheriting heir.

The Mo. Valley & B. Ry. & Bridge Co. v. Harrison County.

the property of the testator, confers the power to withhold from an heir a bequest or devise of any property, and thus wholly disinherit him. Such being the statute, the heir complaining in this case has no remedy.

IV. We are of the opinion that the fourth clause of the will expresses the intention that the sum of forty-five dollars be used by Wayne Stennett, an heir and one of the executors, to erect a head-stone at the grave of testator's deceased daughter. The decree of the district court in this regard is correct. It, however, erroneously, though doubtless, mistakingly, names twenty-five dollars instead of forty-five dollars, as the sum to be used.

Other provisions of the decree are not complained of by plaintiffs. It is, therefore, in every particular
AFFIRMED.

THE MISSOURI VALLEY & BLAIR RAILWAY & BRIDGE
COMPANY V. HARRISON COUNTY.

1. **Taxation : EXCESSIVE ASSESSMENT : REMEDY : FAILURE OF SUPERVISORS TO CLASSIFY PROPERTY.** For an excessive assessment of property for taxation, the taxpayer's remedy is with the township board of equalization, and by appeal from the action of such board to the district court, if not satisfied with its action. (Code, secs. 829-831). The board of supervisors has no power to afford him relief. (See opinion for authorities cited.) And the fact that the board of supervisors has not classified the property in question, as it has power to do under Code, section 821, makes no difference.
2. ——— : **RAILROAD BRIDGES : BY WHOM ASSESSED : STATUTES CONSTRUED : CONSTITUTIONALITY.** Under sections 808 and 1319 of the Code, all railroad bridges are to be assessed for taxation by the executive council, except those over the Mississippi and Missouri rivers, and they are to be assessed by the assessors of the local districts in which they are situated ; and such construction does not render section 808 unconstitutional.

Appeal from Harrison District Court.—HON. C. H. LEWIS, Judge.

FILED, MARCH 12, 1888.

74	283
95	83
74	283
96	241
74	283
9118	34

The Mo. Valley & B. Ry. & Bridge Co. v. Harrison County.

THE plaintiff presented a petition to the board of supervisors at the June session, 1887, asking that the assessment of a railroad bridge across the Missouri river be reduced. The relief asked was refused, and the plaintiff appealed, and in the district court a supplementary petition was filed, asking the same relief. To this petition a demurrer was filed and sustained on the ground, substantially, that neither the court nor board of supervisors had jurisdiction of the subject-matter. The plaintiff appeals.

Hubbard & Dawley and *L. R. Bolter & Sons*, for appellant.

J. A. Phillips and *H. H. Roadifer*, for appellee.

SEEVERS, C. J.—This case can be best disposed of by considering the points relied on by appellant, and it will not be necessary to set out at length the pleadings. The bridge in question is across the Missouri river, and one-half thereof is conceded to be assessable in Iowa. The assessment was made by the assessor, at the proper time, early in 1887, such assessment being one hundred and ten thousand dollars; and the plaintiff claims it should not have been more than eighty-five thousand dollars. But the plaintiff failed to apply to the township board of equalization for a reduction or correction of such assessment.

I. At most, the assessment was excessive; that is, on the plaintiff's theory, a greater value was placed on the bridge than should have been done.

1. TAXATION:
excessive
assessment:
remedy:
failure of
supervisors to
classify
property.

It is provided by statute that the township trustees constitute a board of equalization, and that they shall meet on a named day, and equalize the assessments in their respective townships by increasing or diminishing the valuation of any piece of property. Code, secs. 829, 830. The plaintiff was bound to know that its property had been assessed, and, if it felt aggrieved thereby, it had the right to appear before such board of equalization. If dissatisfied with the result, the right of appeal

DECEMBER TERM, 1887.

The Mo. Valley & B. Ry. & Bridge Co. v. Harrison

existed. It may be conceded that the assessment is erroneous; that is, the value of the bridge was assessed by the assessor at more than it should have been. The fact simply shows it to have been an overassessment. In such case the remedy of the taxpayer is to apply for a correction to the township board of equalization. See *Macklot v. City of Davenport*, 17 Iowa, 379; *Dubuque County*, 43 Iowa, 592. The taxpaying property in such case, in the first instance, applies to the township supervisors for relief, for the reason that the township board only has the power to equalize the assessments between the several townships or other taxing districts in the county. Code, sec. 832. And this is the effect of the holding in *Cassett v. Sherwood*, 42 Iowa, 626; *v. Supervisors of Mitchell County*, 44 Iowa, 107; and *Getchell v. Supervisors of Polk County*, 44 Iowa, 107; cited by counsel for appellant.

II. But counsel for the appellant contends that the township board of supervisors have the power to classify the property in their county, and, as they failed to do so as to the bridge in question, therefore the plaintiff was not bound to apply for a correction in the first instance. It is said that such classification is made for the purpose of equalization. It is contended that the board has the power to classify the property in the county for the purpose of taxation. Code, sec. 832. But the primary object of such classification is for the benefit of the assessor, and to the end that uniformity be obtained in the assessments in the different townships. See *Burnham v. Barber*, 70 Iowa, 87. The statute cannot be regarded as mandatory. No penalty is attached if the board fails to do so, nor are there any negative words in the statute. Therefore it is regarded as merely directory. Besides, a fair construction of the statute gives the board in this respect, where an assessment has been made by the assessor, could not possibly have the power to give the board of supervisors the power in the first instance to correct the assessment between the several townships, for the reason that no such power is conferred on such board.

The Mo. Valley & B. Ry. & Bridge Co. v. Harrison County.

III. It is contended that the bridge in question is part of a continuous railroad extending through Iowa and into the state of Nebraska, and is used exclusively for railroad purposes, and therefore the assessment must be made by the executive council. The statute now in force providing for the assessment of the property of railroad companies was enacted in 1872. Chapter twenty-six, Laws Fourteenth General Assembly, provides that railroad property shall be assessed by the census board (executive council), but section ten thereof is as follows: "No provision of this act shall be held to apply to any railroad bridge across the Mississippi or Missouri rivers; but such bridges shall be assessed and taxed on the same basis as the property of individuals." This statute, without material change, is now a part of the Code (secs. 1317-1322, inclusive); and section ten, above set out, now constitutes section 808 of the Code. The only difference between the statute passed in 1872 and the Code is one of form or arrangement only. But it is clearly provided in the Code that the bridge in question shall be assessed and taxed on the same basis as the property of individuals. It was clearly competent for the general assembly to so provide. It is claimed that there is a conflict between sections 808 and 1319 of the Code. The latter provides that the entire railway in the state, including bridges, shall be assessed by the executive council; and section 808 provides in substance that the bridge in question shall be assessed by the assessor of the township. As these two sections relate to the same subject, it is our duty to so construe them that both may stand, if this can be done consistently with the language employed. The express provision of section 808 is that bridges across the Mississippi and Missouri rivers shall be assessed and taxed on the same basis as the property of individuals. The bridges, therefore, constitute a named class, and the word "bridges" in section 1319 must be construed to mean and include all other bridges which form a part of a railroad. This, undoubtedly, is the proper

2. —: railroad
bridges: by
whom
assessed:
statutes con-
strued: con-
stitutionality.

The Mo. Valley & B. Ry. & Bridge Co. v. Harrison County.

construction of the original act, and the different arrangement of the sections thereof in the Code will not warrant a change in the construction.

IV. It is further insisted that the construction we have adopted has the effect to make the statute unconstitutional, because it is therein provided
THE SAME. that "all laws of a general nature shall have a uniform operation. The general assembly shall not grant any citizen or class of citizens privileges or immunities which, upon the same terms, shall not belong to all citizens." We believe at one time it was doubted by some whether so much of the statute as authorizes the executive council to assess railroad property was constitutional; but we think there is no doubt that section 808 of the Code is constitutional. It is of uniform operation, and does not grant any privileges or immunities to any person or corporation. All are placed on precisely the same plane. Besides this, we believe it to be true that, if all the statutes specifically providing for the assessment of railroad property should be declared unconstitutional, the general statutes relating to that subject would be applicable to the case in hand, and under such statutes the assessments would necessarily have to be made in the precise manner that was adopted in this case. Therefore, in no view that may be adopted can the assessment or taxation of the bridge be declared illegal or void.

The judgment of the district court is

AFFIRMED

La Rue v. King.

LA RUE V. KING *et al.*74 288
78 25474 288
86 54274 288
108 58974 288
118 328

1. **School Lands : FORECLOSURE OF SALE CONTRACT : PURCHASE BY SURETY : EFFECT OF PRIOR TAX SALE.** The surety of a purchaser of school land upon credit may purchase the land at judicial sale upon the foreclosure of the contract of purchase, even though the judgment on which it is sold is against him as well as his principal ; and his title will be free from any encumbrance on account of a prior sale of the land for taxes, under chapter 101, Laws of 1876.
2. **Tax Sale and Deed : RIGHTS BASED THEREON : STATUTE OF LIMITATIONS.** The statute of limitations begins to run against a purchaser at tax sale at the time when he might obtain a deed ; *i. e.*, three years after the date of sale ; and after five years from the time it begins to run, not only is the tax title extinguished, but all rights which are dependent upon it. (See cases cited in opinion.)
3. **——— : FAILURE OF TITLE : RECOVERY OF TAXES : STATUTE OF LIMITATIONS.** One who bids off land for taxes, and pays subsequent taxes thereon, but fails to get title to the land, cannot recover of the owner the taxes so paid by him after five years from the date of payment. (Compare *Sexton v. Peck*, 48 Iowa, 251 ; *Brown v. Painter*, 44 Iowa, 368.)
4. **——— : ——— : ——— : WHEN NOT ALLOWED.** Where one bids off at tax sale school lands which have been sold on credit, and pays subsequent taxes thereon, and afterwards the land is sold upon a foreclosure of the school-fund mortgage, he cannot recover the taxes paid by him of the purchaser at the foreclosure sale, because, the taxes having been paid before such purchaser obtained title, there can be no presumption that they were paid at his request. (*Goodnow v. Moulton*, 51 Iowa, 555, and *Fogg v. Holcomb*, 64 Iowa, 621. *distinguished.*)

Appeal from Adams District Court.—HON. R. C. HENRY, Judge.

FILED, MARCH 12, 1888.

ACTION brought by Frank L. La Rue to enjoin the execution of a tax deed, and to set aside the tax sale. Defendant King filed answer, by which he resists the

La Rue v. King.

granting of the relief asked, and asks affirmative relief. A demurrer to his answer was sustained. He elected to stand on his answer, and a decree for plaintiff was rendered, as prayed. By agreement, the case as to defendant, the treasurer of Adams county, is to abide the issue as to defendant King. Defendants appeal.

W. S. Strawn, for appellants.

H. T. Granger, for appellee.

ROBINSON, J.—The land involved in this action was a part of the land granted to the state for school purposes. In 1866 Adams county entered into a contract with Mark Homan for the sale of this land. Homan failed to make the payments required by the contract, and in March, 1881, it was foreclosed. The land was sold under special execution in June, 1882; and January 8, 1884, a sheriff's deed was issued, pursuant to the sale, to the purchaser, one Snyder, who is the plaintiff's grantor. October 1, 1877, the land was sold to defendant King for the delinquent taxes of 1874-1876. The purchaser afterwards paid the taxes of 1877-1882. In December, 1886, King served plaintiff with notice of the taking of a tax deed under the sale aforesaid. The answer admits these facts, and alleges that Snyder signed the note of Homan secured by the school-land contract as surety; that judgment was rendered against him for the full amount of the note, interest and costs in the foreclosure proceedings; that he purchased the land pursuant to and under his obligation to pay the debt; and that the land is so liable in his hands, and in the hands of his grantee, for the taxes specified.

I. The first question we need to consider is the effect of the purchase by Snyder. It is claimed by appellants that the sale to him did not free the land from the taxes paid; that it only transferred to him the interest of his principal; that he could take no higher interest than that of his principal; and that such interest was specifically made, by statute, subject to the lien

1. SCHOOL lands:
foreclosure of
sale contract:
purchase by
surety: effect
of prior tax
sale.

La Rue v. King.

of a tax sale. It is true that Snyder was surety for Homan on the school-fund note, but he was not a party to the land contract. As surety, it was his privilege to have the property of his principal first exhausted before his own property could be taken to satisfy the judgment debt. This being true, he had the right to have the property of his principal sold for the best price which could be obtained, and, if he was willing to pay more than any other bidder, there was nothing in the law to prevent his doing so. It is true that the price he paid for the land satisfied the judgment for the payment of which he was bound; but in law the payment was made by the principal through the sale of his property, and it not only satisfied the judgment, but discharged his contingent liability to his surety as well. In case the surety had paid the judgment without a sale of the property, he would have been entitled in equity to be subrogated to all the rights of the creditor. *Searing v. Berry*, 58 Iowa, 23. We see no reason for holding that by the sale he assumed the liabilities of his principal with the title which he received.

II. Defendants ask that the tax sale be enforced against plaintiff, or, if that cannot be done, that King be permitted to redeem from the foreclosure sale, alleging that he was not a party to the foreclosure proceedings. Plaintiff objects to the granting of this relief, on the ground that it is barred by the lapse of time. If defendants are entitled to any relief whatever, the foundation of that right must be found in the tax sale. That sale was made October 1, 1877. Had King pursued the course authorized by statute, he would have been entitled to a deed on the first day of October, 1880. The statute of limitations began to run against him not later than that date. *Hintrager v. Hennessy*, 46 Iowa, 602; *Executor of Griffith v. Carter*, 64 Iowa, 197; *Hintrager v. Traut*, 69 Iowa, 747. Hence King's right to a deed was barred on the first day of October, 1885. That right having lapsed, all rights which were dependent upon it must be at an end. *Smith*

2. Tax sale and deed: rights based thereon: statute of limitations.

La Rue v. King.

v. Foster, 44 Iowa, 443. Therefore, King is not entitled to have the tax sale established as paramount to the title of plaintiff, nor can he be permitted to redeem from the foreclosure sale.

III. Defendants insist that King is at least entitled to recover of plaintiff the taxes which it is admitted he has paid. It is evident, from a consideration
3. —: failure of title: recovery of taxes: statute of limitations. of the decisions of this court, that he cannot recover for any taxes paid more than five years prior to the filing of his counter-

claim. *Sexton v. Peck*, 48 Iowa, 251; *Brown v. Painter*, 44 Iowa, 368. Defendants admit that King has never occupied the land, and there does not appear to have been any contest as to title when the taxes were paid. We need consider only the taxes of 1882. If they were paid
4. —: —: —: when not allowed when due, as we must presume, in the absence of any showing to the contrary, for the purposes of this case, they had been paid more than three years when plaintiff obtained his title. It cannot be said that plaintiff was under any obligation to pay the taxes of 1882, when paid by King; hence no request to pay, and promise to refund, can be presumed against the plaintiff, and no support for such a claim can be found in *Goodnow v. Moulton*, 51 Iowa, 555, nor in *Fogg v. Holcomb*, 64 Iowa, 621. King is now in no better position to enforce a claim for this tax against plaintiff than he would have been had he made the payment without reference to the tax sale.

IV. Counsel for appellants have devoted a portion of their argument to the consideration of alleged fraud. We discover nothing in the record to sustain any claim of fraud.

We discover no error in the sustaining of the demurrer. The case is, therefore,

AFFIRMED.

Schulte v. Keokuk County.

SCHULTE V. KEOKUK COUNTY.

Intoxicating Liquors: PROSECUTION: SEVERAL COUNTS IN ONE INFORMATION: ATTORNEY'S FEES. An attorney selected by a peace officer, for appearing before a justice of the peace and prosecuting a defendant for the unlawful sale of intoxicating liquors, is entitled to only five dollars, under section 3829 of the Code, no matter how many distinct offenses, stated in as many counts, are charged in the information upon which the prosecution is based. (Compare Code, sec. 1540.)

Appeal from Keokuk District Court.—HON. W. R. LEWIS, Judge.

FILED, MARCH 12, 1888.

ACTION to recover attorney's fees for appearing and prosecuting a person charged with the unlawful sale of intoxicating liquors. A demurrer to the petition was sustained, and judgment rendered against plaintiff for costs. Plaintiff appeals.

A. G. Schulte, pro se.

No appearance for appellee.

ROBINSON, J.—The amount involved being less than one hundred dollars, the trial judge certified that the opinion of this court is desirable on the following question: "Under the Code of Iowa, is an attorney selected by a peace officer to prosecute an information of twelve counts, each count charging a separate and distinct sale of intoxicating liquors to different persons, entitled to a fee of five dollars for each count prosecuted to judgment?" The selection in question was made in March, 1886. The plaintiff was allowed five dollars for the services rendered, but claims sixty dollars, for the reason that twelve counts were involved in the prosecution, all

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3829. A prosecution
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district court did not

BUCK V. HOLT *et al.*

1. **Judgment : WHEN RENDERED : RECITAL OF DATE CONTRADICTED BY CLERK'S FILING.** Where a decree recited that it was rendered on a certain date, *held* that the date of its rendition could not be contradicted by the clerk's certificate as to the time of filing it. (Compare *Holmes v. Budd*, 11 Iowa, 109; *Morneyer v. Cooper*, 85 Iowa, 260.)
2. **Appeal : TIME OF TAKING : DATE OF JUDGMENT.** The time for taking an appeal dates from the time when the judgment appealed from is rendered as shown by the judgment itself, and not from the date shown by the clerk's filing, where there is a discrepancy. (Compare *Carter v. Sherman*, 68 Iowa, 694.)
3. ——— : **TRIAL DE NOVO : IMMATERIAL EVIDENCE WANTING.** A trial *de novo* will not be refused in this court on the ground that the evidence is not all in the record, where it appears that the missing evidence is immaterial. (Compare *Palo Alto County v. Harrison*, 68 Iowa, 86.)
4. **Deed : EXECUTION : EVIDENCE.** A warranty deed made by a woman and her husband cannot be invalidated as against the grantee, much less against a *bona-fide* subsequent purchaser, upon the testimony of the woman that she was not aware that she had signed a warranty deed, but thought that she had signed a power of attorney to sell other land, and that at the time she supposed that she had lost through tax sales the land described in the deed; and the testimony of the husband that they did not execute the deed, but a power of attorney;—the woman making no claim that any fraud was practiced upon her, nor that she did not know the contents of the paper, and the husband stating that he did not read the instrument at all, but understood that it was a power of attorney.
5. **Tax Sale : PRIOR PAYMENT OF TAX : EVIDENCE.** The evidence in this case, consisting of an imperfect stub of a tax receipt and other evidence (see opinion), considered, and *held* to show that the tax for which the land in question was sold had been paid prior to the sale.

74	294
107	376

74	294
128	222

74	294
182	103

74	294
135	366

74	294
136	562

Buck v. Holt.

6. **Vendor and Vendee : NOTICE OF PRIOR TITLE : POSSESSION : WHAT SUFFICIENT.** A purchaser of land is charged with notice of the rights of a prior purchaser from his grantor, even though the prior deed is not on record, if the prior purchaser is in possession of the land ; and in this case *held* that the fact that the prior purchaser had enclosed the land with furrows, some of which were within its boundary line, some upon that line, and some outside, and that such furrows were easily seen and their existence a matter of notoriety in the neighborhood, was such possession as to charge the subsequent purchaser with notice of his rights. (See cases cited in opinion.)
7. **Tax Sale and Deed : WRONGFUL SALE : RECOVERY OF TAXES PAID.** One who in good faith purchases land at tax sale, and procures a tax deed which is valid on its face, and afterwards pays taxes on the land, may recover such taxes from the owner, when he has the tax deed set aside in a court of equity on the ground that no taxes were due on the land when it was sold ; and such taxes will be made a lien on the land in such equitable action. (Compare *Gardner v. Early*, 69 Iowa, 45.)
8. **Occupying Claimant : RECOVERY FOR IMPROVEMENTS : REMEDY : PRACTICE.** An occupying claimant of land, when made a defendant in an action to quiet title in another, cannot in that action set up his claim for improvements, but must wait until the question of title is determined against him. (See *Fogg v. Holcomb*, 64 Iowa, 628.)

Appeal from Sioux Circuit Court.

FILED, MARCH 12, 1888.

ACTION in equity to quiet title to a quarter-section of land in Sioux county, and for general equitable relief. Defendant Nellie Holt claims title under a tax deed, and defendant Milo D. Gibbs claims title under a deed from a grantor in plaintiff's chain of title. The circuit court rendered a decree in favor of plaintiff and against both defendants. The defendants appeal.

Finley Burke, George W. Hewitt and T. B. McMartin, for appellant Holt.

Pitts & Kessey, for appellant Gibbs.

J. J. Bell and W. S. Palmer, for appellee.

Buck v. Holt.

ROBINSON, J.—I. Appellee insists that the appeal was prematurely taken, and hence that the case cannot be considered on its merits. It appears that

1. JUDGMENT:
when rendered:
recital of date
contradicted by
clerk's filing.

the case was submitted to the circuit court at the February term, 1886, and then taken under advisement, to be determined, and decree entered and recorded, in vacation, as of said February term. The decree recites that it was rendered on the twenty-third day of August, 1886, and the notices of appeal were served, and the clerk secured his fees for a transcript of the record, on the twenty-eighth day of that month. The abstract sets out the decree, and at the end thereof shows the following: "Filed, September 4, 1886. Jellie Pelmulder, Clerk, C. C." We infer from this, and from the arguments of counsel, that the paper on which the decree was originally written and signed by the judge of the court was not filed with the clerk and recorded until several days after the notices of appeal were served, and fees for a transcript secured. The real question presented for our determination is whether the decree, as recorded, can be contradicted by the clerk's record of the time when the paper upon which it was originally written was filed. We are clear that this question must be answered in the negative. The decree is a verity, which must stand as recorded until corrected by the proper proceedings. It cannot be controverted by the certificate of the officer whose duty it is to preserve it. *Holmes v. Budd*, 11 Iowa, 190; *Mornyer v. Cooper*, 35 Iowa, 260. The material fact is the time when the decree was rendered. *Carter v. Sherman*, 63 Iowa, 694. The decree itself says it was rendered on the twenty-third day of August, 1886. This statement cannot be overcome by the certificate of the clerk. Hence we conclude that the appeal was not taken prematurely.

2. APPEAL:
time of taking:
date of judgment.

II. It is further insisted by the appellee that this court cannot try the case *de novo*, for the reason that the

Buck v. Holt.

3. — : trial de
novo : imma-
terial evi-
dence want-
ing.

evidence offered in the circuit court was not properly preserved and certified by the trial judge, and that a portion of the evidence so offered is not before this court. The abstract of appellants contains one hundred and sixteen pages. Appellee filed an additional abstract, containing one hundred and eight pages, of which more than eighty are devoted to the giving of evidence alleged to have been omitted or misrepresented by appellants. It appears from this additional abstract, and the arguments by counsel for appellee, that the evidence in dispute consists of portions of certain county records which are in fact abstracted, or the contents of which are shown. In the view we take of this case, we deem the evidence alleged to have been omitted to be immaterial. All the evidence material to a determination of the case on its merits is shown to be before us, and we will not, therefore, refuse to hear the case on its merits because immaterial matter may not have been preserved. *Palo Alto County v. Harrison*, 68 Iowa, 86.

III. It appears from the record that one Helen M. Pease held title to the land in controversy from May 17, 1862, to August 29, 1865. Between these dates she married a man named Weed. On the last-named date she and her husband executed a warranty deed for the land to her brother, Henry R. Pease. This deed is attacked by defendants, on the ground that the grantors therein supposed that it was a power of attorney to convey land thought to be near Council Bluffs, and that they had no intent to execute a warranty deed for the tract in controversy. The evidence to support this claim is very meager and unsatisfactory. Mrs. Weed testifies that she was not aware that she signed a warranty deed to her brother; says that it is her remembrance that she gave him a power of attorney in 1865 to convey land in Iowa which she supposed was located in or near Council Bluffs; that at that time she supposed she had lost her Sioux county land by non-payment of taxes. She does not claim that her brother used any artifice or

4. DEED: execu-
tion: evi-
dence.

Buck v. Holt.

fraud to procure the deed, nor that she did not in fact know its contents when she executed it. The husband testifies that they did not execute to the brother any conveyance but the power of attorney ; but states that he did not read the instrument which he signed, but understood it was a power of attorney, and not a deed. It is worthy of note, in this connection, that Mrs. Weed misdescribes the instrument which she executed to defendant Gibbs in December, 1884. It is evident that the evidence submitted is wholly insufficient to show that the deed to Henry R. Pease was invalid. No ground for relief against him is shown, and certainly no presumption is raised against his grantee, who holds title by warranty deed. *Winkler v. Miller*, 54 Iowa, 477.

IV. It is contended by appellee that he paid the tax of 1867, for which the tax deed to defendant Holt was given, on the twenty-fourth day of August, 1868. The tax sale took place on the first day of February, 1869. To support this claim, the appellee shows that, in the spring or early summer of 1868, he ascertained the amount of tax on the land in controversy, and on another tract of eighty acres in Sioux county, including, as he then understood it, the taxes of 1867. In August, of the year 1868, he caused to be sent to the treasurer of Sioux county money sufficient to pay all delinquent taxes, including those for 1867, for the purpose of paying such taxes. Receipts were returned to him, seven of which are in evidence. Plaintiff testifies that when these tax receipts were received, in 1868, he supposed and believes that one for the tax in controversy was with them. He shows facts which might reasonably account for its loss, and does not know where it is. All the receipts introduced are dated August 24, 1868. Three are for the taxes of 1860, 1861 and 1862, on the eighty alone, and four are for the taxes of 1863, 1864, 1865 and 1866, on both tracts. In addition, a stub of a tax receipt was introduced in evidence, dated August 24, 1868, showing payment of taxes on both tracts of land. The year for which the taxes were paid is not

5. Tax sale:
prior pay-
ment of tax:
evidence.

Buck v. Holt.

a furrow to be broken on each' side of it. In some places the furrows were on the land,—in some, on its boundary lines; and in some, outside such lines; but together they enclosed the land. Plaintiff took such possession with intent to hold the land, and assert his ownership; and he has since that time endeavored to maintain it. When Gibbs took his deed, there was no house or other improvement on the land, and no evidence of possession, excepting these furrows. He claims to have gone onto the land prior to the purchase, and that at that time he did not see the furrows. He places the time of his visit in November, before his purchase; but whether it was before or after the time given for the plowing of the furrows is not shown. That, however, is not material, for the reason that it is in evidence that when he made the purchase the furrows inclosed the land, and were easily seen, and their existence a matter of notoriety in that neighborhood. We therefore conclude that, when he purchased, the land was so far actually occupied by, and in the actual possession of, plaintiff, that defendant Gibbs was chargeable with notice of his interest therein, and that no title passed by the deed of December 18, 1884. *Sapp v. Walker*, 66 Iowa, 497; *Ellsworth v. Low*, 62 Iowa, 180; *Spitler v. Scofield*, 43 Iowa, 572.

VI. Appellant Nellie Holt avers that she has paid taxes, by virtue of the tax sale and deed under which she claims title, from the year 1869 to 1883, inclusive, and shows the dates and amounts of such payments. She asks that, in case the tax deed be held invalid, she be permitted to recover of plaintiff the amount of the payments she has made, with interest, and that the same be established as a lien against the land in question. The evidence satisfies us that she holds a tax deed which appears to be valid on its face; that she has in good faith paid the taxes for fifteen years. Plaintiff has received the benefits of these payments, and should repay them to defendant Holt, with interest. *Gardner v. Early*, 69 Iowa, 45.

7. Tax sale and deed: wrongful sale: recovery of taxes paid:

Barber v. Barber.

VII. Appellant Gibbs alleges that he took possession of the land under his deed, and made valuable improvements thereon. He asks that, in case his deed is found not to have passed title to him, he be awarded the value of his improvements. We do not determine whether he is entitled to recover for them or not, but find it sufficient to say that, if he is entitled to any relief, it must be obtained by other means than this action. *Fogg v. Holcomb*, 64 Iowa, 628.

VIII. The decree of the circuit court is so far modified as to allow appellant Nellie Holt to recover of appellee the sum of \$505.62; and said amount is established as a lien against the premises in question. In all other respects this case is

AFFIRMED.

BARBER V. BARBER *et al.*

1. **Marriage: INSANITY OF HUSBAND: NOTICE TO WIFE: PRIOR APPOINTMENT OF GUARDIAN: COMPENSATION TO WIFE.** Where a woman had been acquainted with and engaged to a man for some years, and had known of his doing business and managing large property interests, and supposed him to be of sound mind up to the time of their marriage, *held* that her knowledge that a nephew was opposing the marriage was no notice to her that he was insane; nor did the fact that the nephew had a few days before made application to the circuit court of the county for the appointment of a guardian for such person, and had himself been appointed temporary guardian, charge her with knowledge of his insanity, in the absence of actual knowledge of such facts; but that, the marriage being afterwards declared a nullity on account of his insanity, she was entitled to compensation, under section 2236 of the Code, as one who had entered into the contract in good faith, in ignorance of the insanity.
2. ——— : ——— : **DISSOLUTION: COMPENSATION.** Where a marriage was decreed to be a nullity on account of the insanity of the husband at the time of the contract, and it appeared that the wife was in good health when married, but that she had lost her health on account of the deprivations suffered by her while living with her husband, and it further appeared that he was worth about fifteen thousand dollars at the time the marriage was annulled by the decree, *held* that an allowance to her of thirty-five hundred dollars was fair compensation, under section 2236 of the Code.

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e138	754

Barber v. Barber.

Appeal from Bremer District Court.—HON. G. W. RUDDICK, Judge.

FILED, MARCH 12, 1888.

PLAINTIFF alleges that she was married to defendant Maxfield Barber on the fourth day of November, 1881; that he refuses to support, and has deserted her; that in consequence of his cruel treatment she has become an invalid; that she is sick, penniless, and unable to support herself. She further alleges that the validity of the marriage is questioned by defendants, and asks that its validity be determined, and, if found valid, that she be allowed separate maintenance and permanent alimony; and if found to be invalid, that she be adjudged to have entered into it in good faith, and that she be given judgment for fifteen thousand dollars. Defendants admit the alleged marriage, but aver that at the time it took place Maxfield Barber was of unsound mind, and incapable of making a marriage contract; that defendant W. W. Barber was at that time the guardian of his property; and that plaintiff had full notice and knowledge of said facts at the time of the alleged marriage. The district court decreed that the marriage was void because of the insanity of defendant Maxfield Barber; that plaintiff entered into the marriage in good faith, and without knowledge of said insanity; and awarded her as compensation the sum of thirty-five hundred dollars. Defendants appeal from so much of the decree as found that plaintiff entered into the marriage in good faith, and awarded her the sum aforesaid, and were first to give notice of appeal. Plaintiff appeals from so much of the judgment as fixed the amount of her recovery at thirty-five hundred dollars.

Gibson & Dawson, for appellants.

M. E. Billings and *W. L. Eaton*, for appellee.

Barber v. Barber.

ROBINSON, J.—I. Appellants insist that appellee did not become a party to the marriage contract in good faith, and therefore that she is not entitled to any compensation by virtue of section 2236 of the Code. This is as follows:

1. MARRIAGE :
insanity of
husband :
notice to
wife : prior
appointment
of guardian :
compensation
to wife.

"In case either party entered into the contract of marriage in good faith, supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree, and the court may decree such innocent party compensation, as in cases of divorce."

The defendant W. W. Barber is a nephew of defendant Maxfield Barber, and on the thirty-first day of October, 1881, filed an application in the circuit court of Bremer county, asking that his uncle be adjudged to be a person of unsound mind, and asking the appointment of a guardian of his property. The nephew was appointed temporary guardian of such property on the day his application was filed, and his appointment was made a matter of record. On the first hearing of the application, which was had on the seventh day of February, 1882, the uncle was adjudged to be of unsound mind, and the nephew was appointed permanent guardian of his property. The uncle did not appear at the final hearing. Considerable evidence is submitted on the question of the sanity of Maxfield Barber at the date of the marriage, and for a considerable time both prior and subsequent thereto. A number of witnesses, who appear to be intelligent, and well acquainted with him, testify that they never saw any indication of mental unsoundness. Some of them had done business with him frequently. It is shown that he has been engaged in doing business for himself, and in his own name, in a distant state, during most or all the time that his nephew has acted as guardian of his property, and that the nephew has sent to him money to be used and invested by him. He is a man of property, and was engaged in managing it for some years prior to the marriage; and no actual notice of the alleged mental

Barber v. Barber.

unsoundness is shown to have been given to plaintiff at any time prior to that event. We think the decree of the district court in finding that she entered into the marriage in good faith is abundantly sustained by the evidence. But it is said that the application of W. W. Barber and his appointment as temporary guardian were of record at the date of the marriage, and the plaintiff was chargeable with notice of their tenor and effect, and of the facts which they indicated. We do not think that constructive notice has anything to do with the question of the good faith of appellee. If she had no knowledge of any fact which would naturally cause a doubt to arise in her mind as to the sanity or capacity to contract of Maxfield Barber, and in fact supposed that he was capable of contracting, then she entered into the contract in good faith, and is an innocent party entitled to compensation. Every person who has attained his majority is presumed to have legal capacity to enter into a contract, until the contrary is shown; therefore it was not the duty of plaintiff to examine the county records, and she is not chargeable with negligence for not having done so. It is claimed by appellants that appellee had actual notice of facts which should have caused her to make inquiries which would have disclosed the alleged insanity of Maxfield Barber, and that because she neglected to make such inquiries she was negligent, and is chargeable with knowledge of his insanity. It seems that the wedding was arranged to take place at Waverly, but when the appointed day arrived the plaintiff was told by Maxfield that they could not get married there, because his nephew was making trouble, or words to that effect. They then went to Manchester, where they were married the next day. It is not shown that plaintiff was informed of the nature of the trouble the nephew was making. It appears that he had been induced to move from Ohio to Iowa by the uncle, and had been led to believe that he would have his uncle's property in time. At the date of the marriage the uncle was about sixty-three years of age. Under such circumstances it would

Barber v. Barber.

not have been unnatural for the nephew to oppose the marriage for reasons personal to himself. Plaintiff had known Maxfield, and had been engaged to marry him, for years. She had known of his doing business and managing large property interests during that time, and supposed him to be of sound mind. We do not think that under these circumstances the fact that the nephew was opposing the marriage was any notice to her that her intended husband was insane.

II. All parties to the action complain of the compensation allowed by the district court. It is insisted on the part of appellee that Maxfield has great wealth; that her health has been permanently injured by his miserly and cruel conduct; and that she is justly entitled to a liberal compensation. On the other hand, it is claimed that she lived with him but about two years, and contributed nothing to his property, and therefore that she is entitled to but a small allowance. The evidence shows that when the marriage took place plaintiff was in excellent health; that, after a short residence in Iowa, she and Maxfield went to Missouri and Arkansas, where they lived as husband and wife for about two years; that during this time she was compelled to live in a tent or hut or a poorly-constructed house, without any of the comforts, and with but few of what are regarded as the necessities, of life; and that while enduring this treatment her health became greatly impaired. The amount of property owned by Maxfield is not clearly shown, but we do not think it is shown to be much in excess of fifteen thousand dollars. Assuming that to be about the true amount, we are of opinion that the amount of compensation awarded by the district court is about what the appellee is entitled to receive.

The case is, as to both appeals,

AFFIRMED.

Warbasse & Lee v. Card.

WARBASSE & LEE V. CARD.

74	306
78	229

74	306
79	290

74	306
88	207

74	306
90	126

74	306
138	375

1. **Appeal : BILL OF EXCEPTIONS : DIRECTING CLERK TO INSERT EVIDENCE : SHORT-HAND NOTES NOT TRANSLATED.** Evidence is not preserved for the purposes of an appeal by directing the clerk in a bill of exceptions to insert the evidence taken by the short-hand reporter and filed in the case, where the short-hand notes so filed have not been translated and the translation filed in the case.
2. **— : PRACTICE : REVIEWING INSTRUCTIONS WITHOUT EVIDENCE.** Where instructions complained of are applicable to the issues raised by the pleadings, they may be reviewed in this court, even though the evidence is wanting ; for this court will, in such case, presume that there was evidence warranting the instructions. (See *McMillan v. Burlington & M. R. Ry. Co.*, 40 Iowa, 231.)
3. **Contract : PAROL TO ADD WARRANTY TO WRITING.** Where a written contract is full and complete, it is incompetent, in the absence of fraud, mistake, or the like, to vary it by evidence of a parol warranty not expressed in its terms. (See *Mast v. Pearce*, 58 Iowa, 579.) And it cannot be shown that it was part of the agreement that the whole of the contract was not to be reduced to writing.
4. **Instructions : JUDGED BY ISSUES PRESENTED IN CHARGE.** The correctness of an instruction must be determined by considering it in connection with the issues presented to the jury, and not with issues pleaded but not presented in the instructions.

Appeal from Cerro Gordo District Court.—HON.
JOHN B. CLELAND, Judge.

FILED, MARCH 12, 1888.

ACTION to recover for a furnace sold. Judgment below was for defendant, and plaintiffs appeal.

Sherwin & Schermerhorn and Glass & Hughes, for appellants.

John Cliggitt, for appellee.

Warbasse & Lee v. Card.

SEEVERS, C. J.—The petition states that plaintiffs and defendant entered into the following written contract:

“Mason City, Iowa, August 31, 1882. We agree to furnish, and we agree to pay for, a No. 61 Ruby brick set furnace and covering burrs, delivered at the post-office building of this city, \$194.75. The same to be paid for February 1, 1883. Messrs. Warbasse and Lee to furnish man to superintend the setting of the same and guaranty said heater to work successfully, and operate as well as any other first-class furnace under similar circumstances. Mr. Card to furnish brick-work and materials for setting same, and pay Warbasse & Lee a reasonable price for time of workmen while working on same heater.”

Performance of such contract on the part of the plaintiffs was alleged, and judgment asked. The execution of the contract was denied by the defendant, and, among other things, he pleaded as follows: “That at and prior to the making of said written contract defendant had no knowledge as to the character and capacity of the furnace provided for, or the way to set it; that plaintiffs knew all these matters, and how it should be put up, and defendant was obliged to and did rely on the representations of plaintiffs; that the writings sued on were made by the plaintiffs and signed by the defendant, with the understanding that they did not contain all of the representations, agreements and guaranties orally made between them, nor of the whole contract, and were not to preclude defendant from showing the complete understanding of the parties that the oral agreements should stand as part of the entire contract; that plaintiffs represented that it would not be necessary to make said contract formal and complete; that defendant could confide in the good faith of plaintiffs to carry out the oral agreements; that defendant had confidence in plaintiffs, and, depending on said representations, signed the contract, but defendant alleges that said representations were fraudulent, and for the purpose of inducing him to accept and sign the imperfect contract; that at

Warbasse & Lee v. Card.

or prior to signing said contract, and as part of the contract orally made, plaintiffs orally guarantied that said furnace would be capable of heating all of said rooms in the coldest weather to the temperature of at least seventy degrees, by the use of not exceeding fifteen tons of hard coal during the heating season. That said representations were untrue and fraudulent, and so known to be to plaintiffs."

The court instructed the jury as follows:

"21. If you find from the evidence in this case, and by a preponderance thereof, that the contract and agreement between the parties with respect to the purchase of said furnace in question was, by agreement and understanding between them, made partly in the writings introduced in evidence and partly in parol, and that it was understood and agreed that part only of such contract should be reduced to writing, and the remainder remain in parol, with no writing to witness it, such an arrangement would be legal and binding, and such contract, if in this case shown by a preponderance of the evidence, would be binding according to its terms upon the parties thereto.

"22. You are instructed that if you find from the evidence that there was a contract partly in writing and partly verbal, and further find that the furnace in question, being properly operated, did not comply with and fulfill the terms of such partly written, partly verbal, contract, as alleged, and the defendant notified plaintiffs of such failure, and requested them to remove the same, the plaintiffs cannot recover in this action, and the defendant would be entitled to recover any part of the purchase money paid to plaintiffs, and also any damages by him sustained by reason of the failure of the furnace to work as represented, as such damages may be shown by the evidence, and defined in these instructions.

"23. If you find from the evidence, and by a preponderance thereof, that the plaintiff undertook, promised and guaranteed by said contract, alleged to be partly verbal and partly written, that said furnace would heat to the extent of seventy degrees, or would properly

Warbasse & Lee v. Card.

heat the rooms alleged, by the use of not exceeding fifteen tons of hard coal in each heating season; and further find from the evidence that the said furnace, being properly operated and managed, failed to heat the rooms as agreed, and did, in attempts to heat the same, made with the knowledge and assent of the plaintiffs, use hard coal to an amount in excess of fifteen tons of hard coal in each heating season,—the plaintiffs would be liable for the reasonable value of the coal so used in excess of said fifteen tons in each heating season, as shown by the evidence. But you are instructed that the plaintiffs would not be liable to the defendant for any alleged diminution of the rental value of said rooms by reason of the fact that the same were not heated as represented.

“24. If you fail to find from the evidence that plaintiffs undertook and guaranteed in the alleged partly written, partly verbal, contract that the furnace in question would properly heat the rooms in question by the use of a certain amount of hard coal, you will find for the plaintiffs on the claim for damages for use of an excessive quantity of hard coal.”

I. It is stated in an amended abstract filed by the appellee that the bill of exceptions is as follows: “And in further trial of said cause the following was the evidence in said cause taken down by the official reporter of said court; and objections to the evidence, rulings of the court, exceptions, and all the rulings of the court on the evidence so taken, are as follows:

1. APPEAL: bill of exceptions: directing clerk to insert evidence: short-hand notes not translated.

(Here clerk will insert evidence taken by short-hand reporter and filed in this case June 29, 1886, marked ‘C,’ and certified by this court.”) This is followed by a certificate of the clerk that no translation of the short-hand notes has ever been filed in his office. Counsel for the defendant contends that the evidence is not sufficiently identified in the bill of exceptions, and, therefore, what purports to be the evidence introduced on the trial contained in the abstract should be disregarded, and we feel constrained to say that this position must be

Warbasse & Lee v. Card.

sustained. It is true, the short-hand notes are identified, but they are not intelligible. It is such notes, however, that the clerk is directed to insert in the bill of exceptions prepared for this court. As there has been no translation, he can only send up the original notes. This he has not done; but if he had, we must confess our inability to read or understand them. If there had been a translation filed in the clerk's office, duly certified by the reporter, the clerk would have been authorized to insert it in the bill of exceptions; and transmit to this court the evidence as translated.

II. It will be observed that the court instructed the jury, in substance, that if the evidence justified them in
 2. —: practice: so doing they might find that there was a
 reviewing
 instructions
 without evi- parol guaranty or warranty, in addition to
 dence. the one reduced to writing, and contained
 therein. The instructions were excepted to, and counsel for the appellant contends that they are erroneous. But counsel for the appellee insists that we cannot determine this question, because the evidence is not before us, and therefore the instructions may not be based on or applicable to the evidence. It is apparent that the defendant pleaded as a defense that there was an oral warranty. The instructions, therefore, are applicable to the issue presented by the pleadings; and as to the instructions in such case given by the court the rule is that it will be presumed that there was evidence on which they could be properly based. *McMillan v. Burlington & Mo. R. Ry. Co.*, 46 Iowa, 231. The question, therefore, is fairly presented whether the instructions are erroneous, and we have to say that we think they are. This question was considered in *Mast v. Pearce*, 58 Iowa, 579; and we reached the conclusion that where a writing was full and complete, which did not contain a warranty, or where it did, that an additional warranty could not be established by parol. It is sufficient to say that we adhere to the decision made in that case.

3. CONTRACT:
 parol to add
 warranty to
 writing.

III. It is contended that the cited case is not applicable, for the reason that fraud is pleaded in the case

Blair v. Blair.

4. **INSTRUCTIONS:** at bar, and that in such case a different rule prevails. This may, for the purpose of this opinion, be conceded; but it will be observed that the question of fraud was not submitted to the jury. It is true, the court, in reciting the allegations in the pleadings, stated the fact that fraud was pleaded; but this is not sufficient when the jury are not directed to determine such question, under proper instructions as to what constitutes fraud, and what is the legal effect if the jury find it is established. The other errors assigned cannot be considered because of the condition of the record.

REVERSED.

BLAIR V. BLAIR.

74	311
111	623
111	625

1. **DIVORCE: TEMPORARY ALIMONY: REVIEW ON APPEAL.** An order allowing temporary alimony to a wife in an action for divorce is reviewable on appeal to this court, under Code, section 8164.
2. ———: ———: ———: **EVIDENCE WANTING.** In the absence of all of the evidence on which temporary alimony was granted in the court below, this court cannot say that the allowance was excessive.
3. **APPEAL: FROM NUGATORY ORDER: NO PREJUDICE.** An order setting aside a former order, which has expired by its own terms, is of no effect, and hence no ground for complaint on appeal.
4. **DIVORCE: ATTORNEY'S FEES: ALLOWANCE ON APPEAL.** The decision appealed from in this case provided that the matter of allowing an attorney's fee should be continued to next term, and appellant made no complaint of such provision, but appellee now seeks in this court to have a fee allowed for the services of her attorney on the appeal. There being no proper evidence before this court on which to make such allowance, it is refused, without prejudice to a recovery upon a sufficient showing at the proper time.

Appeal from Webster District Court.—HON. S. M. WEAVER, Judge.

FILED, MARCH 12, 1888.

APPEAL from the decision of the district court in allowing plaintiff temporary alimony in an action brought by her to obtain a divorce from defendant. At

Blair v. Blair.

its October term, 1886, the court below made provision for the support of plaintiff by defendant until the next term, and required the payment by him of one hundred and twenty-five dollars as a retainer for plaintiff's attorney, and to procure the depositions on her part necessary for the trial. On the eleventh day of June, 1887, the district court, on the application of plaintiff for a further allowance of alimony, "ordered and adjudged" that defendant pay to the clerk for the use of plaintiff the sum of three hundred and fifty dollars for her temporary support. Fifty dollars of that amount was to be paid within ten days, one hundred dollars on the first day of July, 1887, and a like sum on the first day of August and on the first day of September of the same year. It was further provided that execution should issue for the several amounts aforesaid, if they were not paid when due. From the last allowance of alimony the defendant appeals.

J. F. Duncombe, for appellant.

Wright & Farrell, for appellee.

ROBINSON, J.—I. Appellee has filed a motion to dismiss the appeal, on the ground that an order for temporary alimony is not reviewable on appeal. Section 3164 of the Code provides that an appeal may be taken to this court from an order which "grants or refuses, continues or modifies, a provisional remedy." We understand that a "provisional" remedy is one provided for temporary purposes, as to meet a present exigency. If the relief granted by the district court be regarded as an order, merely, we think an appeal may be taken from it. It is, however, in the form of a judgment, and, while it is designed to provide for the temporary needs of the plaintiff, it is permanent in form, providing for the payment of fixed amounts on specified dates, and authorizing executions for their collection, and may, therefore, be regarded as a judgment final for the amounts therein named. The motion referred to is overruled on the ground named.

1. DIVORCE: temporary alimony: review on appeal.

Blair v. Blair.

II. Appellant insists that the second allowance of alimony was excessive. Whether it was or not depends upon the circumstances of the parties, as disclosed on the hearing of the application for alimony. The abstract of appellant does not purport to contain all the evidence submitted, nor does it show that such evidence was in any manner made of record. It is even doubtful if it shows that the evidence abstracted was given on the hearing in question. Appellee denies the correctness of the abstract, and moves to strike the evidence therein contained from the record. This motion must be sustained. We have so frequently decided the question which it raises that a citation of authorities at this time would be useless. Since the evidence upon which the allowance in question was made is not before us, we cannot say that it was excessive.

III. When the court below made the allowance of alimony at its term of October, 1886, it provided that the plaintiff should have the exclusive use of the homestead of defendant until the next term of that court. When the allowance of June 11, 1887, was made, the court "ordered and adjudged that the order heretofore made in this case, allowing the plaintiff the use of the homestead, be, and the same is hereby, set aside." Appellant complains of the order quoted. What its purpose was we are at a loss to understand, since the order it refers to only provided for the use of the homestead by the plaintiff until the next term of court. The order objected to seems to us to have been without effect, and hence not prejudicial.

IV. The appellee asks for an order requiring the appellant to pay to the clerk of this court for the use of her attorneys, as compensation for services rendered on the trial of this appeal, the sum of one hundred dollars. The decision from which defendant appeals provided that the matter of allowing an attorney's fee should be continued to the next term of court. No complaint of that action

2. —:—:—:—:
evidence
wanting.

3. APPEAL: from
nugatory
order: no
prejudice.

4. DIVORCE:
attorney's
fees: allow-
ance on
appeal.

Salm, Adm'x, v. Israel Bros.

is made by appellant, nor is it in any manner brought into question by the appeal. The amount which should be allowed for attorney's fees, if anything, depends upon the value of the services, and the ability to pay of the respective parties to the suit. These matters are not shown by any evidence properly submitted to this court. The order requested by appellee is, therefore, refused, but without prejudice to a recovery therefor on a sufficient showing duly made at a proper time.

AFFIRMED.

SALM, ADM'X, *et al.* v. ISRAEL BROS.

1. **Sale : PRICE TO BE PAID : CONSTRUCTION OF CONTRACT.** Defendants, having bought a stock of goods at sixty-five per cent. of their invoiced price, sold a portion of them to plaintiffs, under an agreement that they should be invoiced to plaintiffs "at the invoiced price that first parties (defendants) purchased same for." *Held* that this meant the price which defendants paid for the goods, and not the invoiced price of which they paid only sixty-five per cent.
2. ——— : **FALSE REPRESENTATIONS : REMEDY.** Defendants, having agreed to sell a stock of goods at cost to defendants, and to take city lots in exchange, fraudulently invoiced the goods to plaintiffs much in excess of their cost, and took conveyances of enough of lots at agreed prices to cover the aggregate value of the goods estimated upon the false invoice. *Held* that plaintiffs were entitled to a recovery for the difference between the real cost and that shown by the false invoice, and were not limited to an action to recover enough of the real estate to equal that difference.

Appeal from Polk District Court.

FILED, MARCH 12, 1888.

ACTION to recover seventeen hundred and sixty-eight dollars alleged to have been paid in consequence of the fraud of defendants. A demurrer to the petition was sustained. Plaintiffs electing to stand upon their petition, the cause was dismissed by the court, at plaintiffs' cost. Plaintiffs appeal.

Gatch, Connor & Weaver, for appellants.

Barcroft & Bowen, for appellees.

Salm, Adm'r, v. Israel Bros.

ROBINSON, J.—It appears that the owners of a chattel mortgage on a stock of goods in the city of Des Moines placed the same in the hands of an agent for foreclosure. The agent took possession of the goods, invoiced them, and sold them to defendants at sixty-five per cent. of the invoice price, or for the aggregate sum of \$10,062.51. After defendants had disposed of a large portion of said stock, they sold the remainder to plaintiffs. The agreement of sale was in writing. The following is a copy:

“Des Moines, Iowa, July 21, 1886.

“Article of agreement in exchange of properties, real and personal, made and entered into this day and date above written, by and between Israel Bros., parties of the first part, and Mrs. Ellen Edwards, per J. W. Jenkins, her agent, and J. B. Salm, parties of the second part, witnesseth, that first parties do hereby sell unto the second parties all the goods left remaining of the Hemphill, Hepburn & Traversy stock, excepting counters and shelving, said goods to be invoiced to second parties at the invoiced price that first parties purchased same for; second parties to take possession of goods as soon as invoiced, for said consideration; second parties to deed first parties lot six, University place, subject to fifteen hundred and fifty dollars, which first parties hereby assume; consideration of said property being four thousand dollars, or twenty-four hundred and fifty dollars for the equity; also deed to the first parties their choice of lots in Salm's addition, at four hundred dollars each, excepting lots one, two, twelve and thirteen, which are sold; first parties to take the equity in lot six, University place, in part payment for above-mentioned goods, at twenty-four hundred and fifty dollars, and balance in lots, as above described, in Salm's addition, at four hundred dollars each, until above-said goods are paid for.

[Signed]

“ISRAEL BROS.

“ELLEN EDWARDS,

“Per J. W. JENKINS, her agent.

“J. B. SALM.”

Salm, Adm'x, v. Israel Bros.

It is alleged by plaintiffs that the invoice made by the agent aforesaid fixed the valuation of the goods sold to them by defendants at fifty-two hundred dollars; that defendants knowingly, wilfully and falsely represented to plaintiffs that the invoice price they paid for the goods sold to plaintiffs was fifty-two hundred dollars, when in fact the invoice price paid was only thirty-four hundred and thirty-two dollars; that, by means of said representation, plaintiffs were induced to pay to defendants the entire sum of fifty-two hundred dollars, in property, according to the terms of said agreement; that plaintiffs were not aware, at the time said agreement was made, that any invoice of said goods had been made, and were ignorant of the actual price paid by defendants for the goods sold to plaintiffs, until after they had made full payment, as aforesaid; that plaintiffs believed, and relied upon, the said representations of defendants, and were deceived and misled thereby to their damage in the sum of seventeen hundred and sixty-eight dollars. Before the final order of the district court was made, the death of J. B. Salm was suggested, and the administratrix of his estate was substituted as plaintiff.

I. The assignment of errors requires us to determine the proper construction of the agreement hereinbefore set out, and especially of that portion thereof which reads as follows:

1. SALE : price
to be paid :
construction
of contract. " Said goods to be invoiced to second parties at the invoiced price that first parties purchased same for." The appellants contend that this clause means that plaintiffs were to pay to defendants the amount they had actually paid for the goods in controversy, while appellees insist that it means that the amount to be paid by plaintiffs was the amount at which the goods had been invoiced by the agent who sold them to defendants. The demurrer admits that plaintiffs had no knowledge that any invoice had been made when the agreement was entered into; hence the agreement does not necessarily refer to the invoice made by the agent. According to Webster, an invoice is "a written account

Salm, Adm'x, v. Israel Bros.

of the particulars of merchandise shipped or sent to a purchaser, consignee, factor, etc., with the value or prices and charges annexed." An "invoiced price," then, as applied to the facts in this case, would be presumed to be the price charged the defendants by the seller, and shown in the written account or bill of items furnished to defendants. In the absence of knowledge to the contrary, plaintiffs would have been justified in assuming that an invoice would show the price actually paid, and not a fictitious one. But the words used in the same clause, it seems to us, place the intent of the parties beyond doubt. Plaintiffs were to pay "the invoiced price that first parties purchased same for." The inference to be drawn from this language is that the invoiced price was the purchase price actually paid by defendants for the goods in question. Otherwise the words, "that first parties purchased same for," would be without natural force or effect.

II. It is said that the agreement was designed to effect an exchange of properties, and that, if the construction contended for by appellants is given, an injustice will be done the appellees, because cash prices were not adopted in the agreement, and cash was not paid; that if defendants obtained a conveyance of lots by fraud, the lots are still, in equity, the lots of plaintiffs; and that, if that be the case, an action to compel the reconveyance of the lots conveyed in excess of the contract price would afford the relief to which the plaintiffs are entitled. The agreement fixed the price to be paid by plaintiffs at that paid by defendants for the same goods. This was not unreasonable, in view of the fact that the goods were the remnants of a stock which had been purchased at foreclosure sale. The prices of the goods, and of the several parcels of real estate, were fixed in the agreement. If defendants have obtained an undue advantage by reason of fraudulent representations, they are not entitled to relief on the ground that the prices named in the agreement were not fair ones. In that

2. — : false
representa-
tions: rem-
edy.

Hanners v. McClelland.

event their present difficulty is the result of their own wrong, and they are not entitled to relief.

III. Other questions discussed by counsel, in view of the construction we place upon the agreement, are immaterial, or are not properly raised by the demurrer and assignment of errors.

REVERSED.

SEEVERS, C. J., took no part in this decision.

HANNERS V. MCCLELLAND.

1. **Slander : CHARACTER OF PLAINTIFF : CROSS-EXAMINATION.** In an action for slander, where none of plaintiff's witnesses had testified on direct examination as to her character, or as to rumors and reports in regard to her, *held* that it was incompetent on cross-examination to inquire as to rumors affecting her character, even though her bad reputation was pleaded in mitigation of damages. (See Code, sec. 2682.)
2. — : **EVIDENCE : OTHER SIMILAR STATEMENTS.** In an action for slander, statements of the character of those complained of, and made by defendant at about the same time, may be shown in evidence against him.
3. — : **GENERAL REPUTATION OF PLAINTIFF : EVIDENCE OF SPECIFIC ACTS AND RUMORS THEREOF.** In an action for slander, defendant pleaded in mitigation of damages that plaintiff was a woman of bad reputation for chastity ; and that at a certain time it was a matter of general rumor that she and her employer held sexual intercourse. *Held* that special acts of sexual intercourse between her and her employer could not be proved, because not pleaded, and that still less could rumors of such special acts be proved ; but that defendant was confined to proof of her general reputation for chastity.
4. **Witness : EXAMINATION : CONVICTION FOR CRIME.** A witness may be asked whether he has ever been convicted of a felony (Code, sec. 3648) ; but not whether he has ever been convicted of a crime, since crimes are not all felonies.
5. **Slander : REPUTATION FOR CHASTITY : NEIGHBORHOOD.** In an action for slander, defendant pleaded that plaintiff was a woman of bad reputation for chastity in the neighborhood of a certain summer resort, and his evidence related only to her reputation in that neighborhood. But, it appearing that she was at the resort only a few weeks, and resided in a neighboring town both before and after her residence there, *held* that evidence of her good reputation at the town was properly admitted on her behalf.

74	318
87	559
74	318
94	600

74	318
118	448

74	318
116	295
117	639

74	318
120	617
121	187

74	318
129	634

74	318
139	746

74	318
144	393

Hanners v. McClelland.

6. **Practice: ARGUMENT TO JURY: READING MOTION FOR CONTINUANCE.** It is not improper for plaintiff's counsel to read to the jury in his opening argument a motion and affidavit for continuance, filed by defendant at a former term, and to comment upon the evidence expected to be furnished, as alleged in the affidavit. (Compare *Cross v. Garrett*, 85 Iowa, 486.)
7. **Costs: OF UNNECESSARY WITNESSES.** It is not error to refuse to tax to the successful party the costs of witnesses subpoenaed by him, merely because they have not been used for any material purpose.

Appeal from Dickinson District Court.—HON. GEORGE H. CARR, Judge.

FILED, MARCH 12, 1888.

ACTION to recover damages for injury alleged to have been caused by slanders uttered by defendant. The case was tried to a jury, and a verdict and judgment rendered for plaintiff. Defendant appeals.

J. W. Cory, for appellant.

Parker & Richardson and Orson Rice, for appellee.

ROBINSON, J.—The plaintiff was employed as servant in a summer resort on Spirit Lake, known as "Sampson's Lodge," from the fifteenth day of June to the fifth day of August of the year 1885. She was married at the time, but separated from her husband. She alleges that about the first of July of that year the defendant stated that he had caught her and his hired man in the act of sexual intercourse; that she was known in Worthington, in the state of Minnesota, as a prostitute, and that she was a "bitch and whore." The defendant denies speaking the words alleged, and states in mitigation of damages that plaintiff is a woman of bad reputation, loose habits and virtue, and that at the time she worked at said lodge it was a matter of general rumor and report in the neighborhood that she and her employer were on intimate terms, and held sexual intercourse, and that these and several similar reports were

Hanners v. McClelland.

common and notorious in said neighborhood, and affected the general character of plaintiff there.

I. Several of the witnesses for plaintiff were asked on cross-examination whether they knew of rumors and

reports in circulation in the neighborhood of Sampson's Lodge at the time in question in regard to the character of plaintiff for chastity. Answers to such questions were

1. SLANDER :
character of
plaintiff :
cross-exami-
nation.

excluded on the objection of plaintiff. None of these witnesses had testified on direct examination as to the character of plaintiff, nor as to rumors and reports in regard to her. It is insisted by appellant that the questions were proper. Section 2682 of the Code provides that "no mitigating circumstances shall be proved unless pleaded, except such as are shown by, or grow out of, the testimony introduced by the adverse party." Where a party is required to plead a fact, it is incumbent upon him to prove it, and this should be done in accordance with the ordinary rules of practice. Nothing in the testimony of the witnesses referred to made the questions of defendant proper on cross-examination, and the answers thereto were rightly excluded. In *Barr v. Hack*, 46 Iowa, 310, a witness was introduced for the purpose of showing the good character of the plaintiff, and testified that his reputation was good so far as he knew. The reputation of a person is the opinion generally entertained of him by persons who know him, or the estimation in which he is held by them. This is indicated by what they commonly report or say ; hence it was proper in the case cited, and so held, to inquire on cross-examination as to particular facts which tended to show that the reputation of plaintiff was not as stated by the witness. The case is in harmony with the views we now express.

II. Several witnesses testified in regard to hearing defendant make statements of the character of those in

controversy. Appellant objected to some of this testimony, on the ground that it did not appear that such statements were made after the slanders alleged in the petition

2. — : evi-
dence :
other similar
statements.

were uttered. We think it sufficiently appears from the record that the conversations testified to by the witnesses took place at about the time of the alleged slanders, and it was, therefore, proper to permit them to go to the jury. 2 Greenl. Ev. sec. 418. The court instructed the jury at considerable length as to the purpose for which such evidence was admitted, and we discover no error in the rulings of which appellant complains.

III. Defendant offered to show by six witnesses, who were named, that the employer of plaintiff "told some of them" that he had had sexual intercourse with plaintiff, and that others of said witnesses had seen plaintiff and said employer in the sexual act a number of times, and that all such acts of intercourse

3. — : general reputation of plaintiff : evidence of specific acts and rumors thereof.

were commonly known and notorious in the neighborhood of Sampson's Lodge, and that plaintiff's general reputation for chastity and virtue had been affected thereby in that neighborhood. Defendant also offered to prove by these witnesses "particular acts of misconduct" as above set out, "and general rumors therewith." To these offers plaintiff objected, and her objections were sustained so far as they related to specific acts, and overruled so far as they related to general reputation for virtue and chastity. Appellant complains of this ruling so far as it prevented proof of particular acts. Notwithstanding this ruling, the record shows that evidence was offered by defendant and received to prove the matters claimed in the offers ; hence it might be said that the ruling, if erroneous, was without prejudice. But we think that under the issues in this case proof of the specific acts named in the offer was rightly excluded. Defendant does not claim that the statements he is said to have made were true, nor does he plead specific acts of sexual intercourse with the employer. His defense, so far as material to the questions under consideration, consists of allegations to the effect that plaintiff is a woman of bad reputation for chastity ; and that, at the time she worked at Sampson's

Hanners v. McClelland.

Lodge, it was a matter of general rumor and common report that she and her employer held sexual intercourse. Defendant was permitted to prove the general reputation of plaintiff for chastity. Did the court err in not permitting him to prove the alleged rumors or reports? Evidence to prove the acts themselves was not admissible, because they were not pleaded, if for no other reason. Code, sec. 2682. Defendant does not, in his answer, claim that he believed the alleged rumors to be true at the time in question, nor even that he knew of them. The only purpose of proving them would be to mitigate damages by rebutting presumptions of malice. But if defendant did not know of them, or, if knowing of them, he did not believe them to be true, they could not affect the question of malice, and therefore would have been improper and prejudicial. 1 Hil. Torts, 394, note, 403, note; *Pease v. Shippen*, 80 Pa. St. 513; *Peterson v. Morgan*, 116 Mass. 352; *Lothrop v. Adams*, 133 Mass. 476. "General reputation of a particular act is not general reputation. It would be strange, if the truth of the act could not be admitted in evidence to mitigate, that the reputation could; that you should exclude the substance, and admit the shadow." *Fisher v. Patterson*, 14 Ohio, 425.

IV. Defendant asked a witness for the plaintiff the following question: "Were you ever convicted of a crime?" The district court sustained an objection to the question, and this ruling is assigned as error. Section 3648 of the Code provides that "a witness may be interrogated as to his previous conviction for a felony." But all crimes are not felonies; hence the question, as framed, was improper, and the ruling of the court in sustaining the objection was correct.

V. Appellant complains that plaintiff was permitted to show that her reputation for chastity in the neighborhood of Spirit Lake was good. It appears that Sampson's Lodge is several miles from the town of Spirit Lake, and the

4. WITNESS:
examination:
conviction
for crime.

5. SLANDER:
reputation for
chastity:
neighborhood

Hanners v. McClelland,

testimony for the defense as to the reputation of plaintiff for chastity was confined to the neighborhood of the lodge. It is insisted by appellant that the reputation of plaintiff at the town of Spirit Lake was immaterial. Under the issues in this case, evidence of the real character of plaintiff for chastity was material only as it affected the amount of her recovery. She spent but a few weeks at Sampson's Lodge, and resided in the town of Spirit Lake both before and after that time. The two places were not far apart, and it seems to us that the evidence as to her reputation in Spirit Lake was not only proper as tending to show her real character, but also as tending to rebut the evidence given on behalf of defendant.

VI. Appellant assigns as error the action of the district court in permitting counsel for plaintiff, while making an argument to the jury after the evidence had been submitted, to read to the jury, and comment thereon, a motion and affidavit filed by defendant at a former term to obtain a continuance. The comments of counsel seem to have been directed to the evidence expected to be furnished as alleged in the affidavit. The motion and affidavit for a continuance were a part of the record, and as such were a proper subject for comment. *Cross v. Garrett*, 35 Iowa, 486. We infer from the record that the acts of which complaint is made occurred in the opening argument, and hence that an opportunity to reply thereto was had by defendant. No abuse of the privilege to which counsel was entitled is shown therefore we conclude that the alleged error is not established.

VII. Defendant moved the district court to retax the costs of certain witnesses, and assigns the overruling of the motion as error. The amount of costs claimed for these witnesses is not shown, nor does it appear that costs for them were taxed. Nor are any facts shown which would have made it the duty of the district court to tax costs for them to plaintiff. It is true that some of them gave no material evidence, but that fact does not show that they had not

6. PRACTICE :
argument to
jury : reading
motion for
continuance.

7. Costs : of
unnecessary
witnesses.

Bothwell v. Farwell.

been properly required to attend the trial. It often happens that evidence which appears to be material in the preparation for trial becomes immaterial by reason of a change in the pleadings, or in consequence of some admission of the adverse party. In such a case it might be proper to tax the costs involved in procuring such evidence to the losing party, even though the evidence was not submitted. It is not shown that the ruling in question was erroneous.

VIII. Many objections are made and argued by counsel for appellant which it would serve no good purpose to mention in detail. It is sufficient for us to say that we have examined all of them, and find no prejudicial error. We conclude from our examination of this case that the defendant was given a fair trial, and that there is no good reason for disturbing the judgment from which he appeals.

AFFIRMED.

74	324
110	355
74	324
128	676

BOTHWELL *et al.* v. FARWELL *et al.*

1. **Evidence ; GENERAL OBJECTION TO INTERROGATORY AND ANSWER : EFFECT.** When a whole interrogatory and its answer are objected to as incompetent and irrelevant, the objection is properly overruled if any portion of the interrogatory and answer is competent and relevant.
2. **—— : OBJECTIONS TO : WHAT CONSIDERED ON APPEAL.** Only such objections to evidence as are made on the trial will be considered on appeal. (Compare *Jaffray v. Thompson*, 65 Iowa, 326 ; *Taylor v. Wendling*, 66 Iowa, 562.)
3. **—— : CROSS-EXAMINATION : WHAT PROPER.** Where an answer sought to be elicited by a question on cross-examination tends in some degree to contradict the testimony in chief of the witness, it is competent and relevant.
4. **Sale : WARRANTY : INSTRUCTIONS.** An objection to instructions as to what would constitute a warranty, on the ground that they took from the jury statements made by the vendor during the negotiations, but four or five weeks before the sale, *held*, upon examination, to be without foundation.

Bothwell v. Farwell.

5. ——— : OF BUCKS: WARRANTY AS TO HEALTH: SUBSEQUENT DISEASE. A warranty upon the sale of bucks that they were all sound and in a healthy condition, and that each one would serve twenty-five ewes, *held* to refer solely to their condition at time of sale, and not to be a guaranty against future disease rendering them unable to serve twenty-five ewes each.

Appeal from Jones District Court.—HON. JAS. D. GIFFEN, Judge.

FILED, MARCH 12, 1888.

ACTION to recover remainder of purchase price of one hundred and seven merino bucks. Defendants admit the purchase, and that the amount alleged to be due has not been paid, but deny indebtedness, by reason of alleged breaches of warranty in the sale of the bucks. Defendants seek to recover of plaintiffs, by way of counter-claim (1) the portion of the purchase price already paid, with interest; (2) for feeding and caring for the bucks, including the value of hay and grain furnished; (3) for loss of profits alleged to have resulted from the failure of the bucks to render the service for which they were purchased. The case was tried to a jury, and a verdict returned in favor of plaintiffs for the amount of their claim. From the judgment rendered on the verdict the defendants appeal.

Herrick & Doxsee, for appellants.

Sheean & McCarn, for appellees.

ROBINSON, J.—It appears from the admissions of record and the evidence that plaintiffs sold to defendants on the twenty-third day of November, 1884, fifty bucks, and on the fourth day of December, 1884, fifty-seven more. All of the purchase price of the first lot was paid at the time of the sale, excepting one hundred dollars. Nothing was paid on the second purchase. The amount alleged to be due the plaintiff is \$472.51, with interest thereon at six per cent. from the first day of July, 1886. The defendants allege that plaintiffs

Bothwell v. Farwell.

verbally warranted the bucks in controversy to be of fine grade; that they were bred and raised in Missouri; that they were all sound and in a healthy condition, and that each one of them would serve twenty-five ewes. Defendants further allege that the bucks were purchased on said warranty, but that they were not in a sound and healthy condition, but were diseased and unfit for service; that they were not bred in Missouri, but in New York and other eastern states; that all these facts were known to plaintiffs at the time the warranty was made and the sale consummated. The alleged warranty is denied by plaintiffs. It is shown that the bucks rendered but little service, and that all but fourteen died before the fourteenth day of May, 1885, and it is alleged that they were worthless when sold.

I. The purchase was effected on the part of defendants by an agent named Berry. The deposition of this agent was taken by defendants and read at the trial. He testifies that the bucks were purchased at Antonita, Colorado, for use near Tres Piedras, New Mexico, with the ewes of defendants. He also testified as to the condition of the bucks and the symptoms of the disease which is claimed to have affected them, and that he tried various remedies. A portion of his evidence was in the nature of expert testimony. On cross-examination, he was asked if he did not write a letter, dated April 4, 1885, to one of the plaintiffs, in which he said: "For God's sake, don't bring any more bucks up in this altitude in the fall, for it will not do. I am satisfied of that;" and, if so, to state how he knew it would "not do to bring bucks up into the altitude of Tres Piedras in the fall. What experience, if any, have you had in that respect?" The answer was: "I wrote a letter * * * some time to about that effect. The reason I wrote to him not to bring any bucks here in the fall, he wanted me to sell some bucks for him. He offered me half we could make on them, and I did not want him to bring them." The witness was then asked if he was not satisfied when he wrote the letter that the death of the bucks was due to the change of climate,

Bothwell v. Farwell.

and answered: "In the spring, before the grass came, I thought that was the cause, but they still kept dying in the spring, after the grass came, in warm weather. Then I did not know how to account for it, and do not yet." These questions and answers were objected to by

defendants, when the deposition was read to the jury, "as incompetent and irrelevant," and the objections were overruled.

1. EVIDENCE:
general objection to interrogatory and answer:
effect.

The objection made to each interrogatory, and the answer thereto, was to the whole, and not to any part, and, therefore, was properly overruled, if any portion of the interrogatory and its answer were both competent and relevant. It may be conceded that the

testimony given was not the best evidence of the contents of the letter referred to; but the objection made does not raise that

2. — : objections to : what considered on appeal.

question. *Taylor v. Wendling*, 66 Iowa, 562; *Jaffray v. Thompson*, 65 Iowa, 326. It may be that the evidence was not strictly proper on cross-examination; but the objection made does not require us to decide whether it was or not. We are clear that so much of the first question as we have quoted, and so much of the answer

thereto as was responsive, were not open to the objection made. The witness had been permitted to testify as to his knowledge of the

3. — : cross-examination: what proper.

cause of the death of the bucks, and the real cause of their death was an issue in the case. The answer sought to be elicited by the question tended in some degree to contradict the testimony of this witness as to that issue, and it was, therefore, relevant. The second interrogatory in question was directed to the same matter as the first, and the answer thereto explained the clause of the letter under consideration. We are satisfied that there was no prejudicial error in the rulings of which complaint is made.

II. Defendants insist that the court erred in refusing to give an instruction asked by them in regard to the warranties which would form a part of the contract for the sale of the second lot of bucks. We do not think the instruction in question was a proper one to

Bothwell v. Farwell.

give. We are of the opinion that the charge of the court sufficiently instructed the jury in regard to the warranties in issue.

III. Defendants complain of a paragraph of the charge which instructed the jury in regard to what declar-

ations or affirmations would constitute a warranty, on the ground that the language used

was such as would take from the consideration of the jury certain statements alleged to have been made on the part of plaintiffs during the negotiations, and some four or five weeks before the first sale. The paragraph of the charge referred to directs the attention of the jury to any declaration or affirmation made "just before or at the sale of the bucks in question." An instruction given at the request of defendants directs the attention of the jury to statements made "at the time of or during the negotiations culminating in the purchase of the sheep." The charge of the court refers to the various matters included in the alleged warranty, and of necessity directed the attention of the jury to conversations in which they were discussed. We do not think the jury could have been misled, as suggested by counsel for defendants. If further instruction was desired, it should have been asked.

IV. The court charged the jury that if the bucks were warranted, and were as warranted at the time of

the sale, then, if "they afterwards became diseased, unsound or incapable of serving ewes, such after-acquired disease, unsoundness or incapability would be no defense in

this action." Defendants object to this instruction, on the ground that the warranty was that the bucks would serve the ewes at a time subsequent to the date of the sale. We do not think this objection is sustained by the record. There is no claim that the bucks were warranted not to become diseased, and we do not think that a fair construction of the pleadings will sustain the claim of defendants. It is true that the alleged warranty is "that they would each serve at least twenty-five ewes;" but the agent was sent to purchase the

4. SALE: warranty: instructions.

5. — : of bucks: warranty as to health: subsequent disease.

Bothwell v. Farwell.

bucks, the answer alleges, "if from plaintiffs' statements, and the appearance of said bucks, they were fine-bred bucks, and guaranteed to be bred and raised in Missouri, to be all right, fit for service and in a sound and healthy condition." It is alleged in one of the counter-claims that, "had said bucks been as represented and warranted," they would have been worth the price paid, while in another it is averred that, "had the bucks * * * been as represented and warranted," defendants would have at least twenty-five hundred lambs, and of a superior quality. The breaches of warranty specified are "that at the time of the purchase said bucks were not in a sound and healthy condition, but were diseased and unfit for service, and said bucks were not bred and raised in Missouri." We think the alleged warranty in regard to the ability of the bucks to render service must be held to apply only to their condition at the time of sale, and not that it should continue.

V. Objections are made to other portions of the charge to the jury. It is not necessary to refer to them in detail, but it is sufficient to say that we discover no error in them.

VI. Various objections are made in regard to the ruling of the court excluding evidence which was designed to sustain defendants' counter-claims. It is evident that the jury found that there was no warranty in the sale of the bucks, or else that there was no breach of warranty. In either case the rulings of which defendants complain could not have been prejudicial to them, and we need not consider them further.

AFFIRMED.

74 330
81 580
74 330
83 41
74 330
181 748

CRANE V. THE CHICAGO & NORTHWESTERN RAILWAY
COMPANY *et al.*

1. **New Trial:** VERDICT CONTRARY TO INSTRUCTIONS. Where a verdict is contrary to the instructions of the court, whether those instructions are right or wrong, it may properly be set aside and a new trial granted.
2. **Mandamus:** BY PRIVATE CITIZEN TO CONTROL LOCATION OF RAILROAD: PUBLIC INTEREST THE TEST. Plaintiff, a resident taxpayer of the town of Polk City, for himself and others, sought to compel the defendant to relocate its main line of railroad so as to run through said town, on the ground that it had originally been so located, and had been aided in its construction by a tax raised in the township, and also by a grant of lands from the county, all upon the condition that it should run by Polk City. *Held* that, unless the interests of the general public were shown to be injuriously affected by defendant's removal of its main line from said town, while it yet gave the town railway facilities by means of a branch, plaintiff was not entitled to the relief asked,—his personal damage, if any, not being ground for such relief.

Appeal from Polk District Court.—HON. JOSIAH
GIVEN, Judge.

FILED, MARCH 12, 1888.

ACTION of *mandamus*. Trial by jury, and finding for plaintiff. A motion for a new trial was sustained and plaintiff appeals.

Callender & Smith and *Barcroft & Bowen*, for appellant.

Hubbard & Dawley, for appellees.

SEEVERS, C. J.—The plaintiff is a resident voter, taxpayer and property-holder of Polk City, in Madison township, Polk county, Iowa, and brings this action for himself and other voters, taxpayers and property-holders in Polk City, and the petition in substance states

Crane v. The Chicago & N. W. Ry. Co.

that the defendant, the Des Moines & Minneapolis Railroad Company; was a corporation organized under the laws of Iowa; that the object, as defined by the charter of said corporation, was to construct and operate a railroad from Des Moines to the state line between the states of Iowa and Minnesota; that prior to August, 1870, said line of road was located through Polk county by Polk City; that a tax was voted in said Madison township, upon the taxable property therein, to aid in the construction of said road from Des Moines by Polk City to Ames, in Story county; that said road was constructed and operated by the way of Polk City from Des Moines to Ames, Polk City being a station on its main line between said places; that said company having complied with the conditions upon which the tax was voted, the same, amounting to about seventeen thousand dollars, was collected and paid to said company; that the county of Polk conveyed to said company about fifteen thousand acres of swamp land belonging to the county, upon the express condition that said railroad should be constructed and operated through and by Polk City; that many citizens of Polk City subscribed and paid for stock in said company upon like conditions; that said road was operated for several years by Polk City as a through line between said places; that in the year 1879, the defendant, the Chicago & Northwestern Railroad Company, leased and became in possession of all the franchises, privileges and property of said former company and of the railroad, and changed the location thereof, and has built and is now operating its main line of road about two miles east of Polk City, to the great damage of the plaintiff and other property-owners in Polk City, and that said line is entirely a different line from the one in aid of which taxes were voted; that plaintiff has demanded of the last-named company that it operate the road as it was originally constructed, which the said defendant refuses to do; that plaintiff owns property in Polk City, which has greatly depreciated in value because of such refusal. The relief asked is that defendant be

Crane v. The Chicago & N. W. Ry. Co.

compelled to operate the road as it was originally constructed and operated. The answer admits some of the allegations of the petition, and denies others. It is denied that plaintiff, or other citizens, sustained any damage by the change made. It is alleged that the road constructed by the Des Moines Company was a narrow-gauge road, which has been changed to a standard gauge, and that the road as now operated has become part of an extensive system of railroads; and that it has become part of a through line between Des Moines and St. Paul. It is also alleged that such road is of greater value and of more use and benefit to the plaintiff and other citizens of Polk City than it was as originally constructed; that, under a contract or understanding with thirty-five of the principal taxpayers of Polk City, a change in the location of the road as originally constructed was made, so that the main line thereof is operated about two miles east of Polk City, but that a broad-gauge road was constructed from Polk City to a point about two miles northeast thereof, where it connected with the main line; and that two passenger trains are run daily from the main line to Polk City on their way from Des Moines to Ames, and two mixed passenger and freight trains are operated to and from Polk City in the same manner. It is also alleged that the line as operated is more advantageous to the plaintiff and other property-owners in Polk City than as the road was originally constructed; and the road as now operated affords reasonable and sufficient facilities for the trade and commerce of Polk City, and for all persons going to or from there; that, owing to the heavy grades, a first-class road could not be operated by Polk City. The defendants also pleaded an estoppel and the statute of limitations. There may be other allegations of the petition and answer to which we have not deemed it necessary to refer.

The court, among others, gave the following instructions to the jury:

“3. I instruct you that, under the uncontroverted facts, the Chicago & Northwestern Railway Company

is bound to maintain and operate a railway substantially upon the line as originally located and constructed, so as to afford reasonable railway facilities to the public. Said company has, however, the right to make reasonable changes and variations from the line as originally constructed and operated, if, in so doing, the public interests would be promoted, though, incidentally, the plaintiff or others would sustain damage by the change."

"5. You will first decide whether the public interest is concerned in having the main line of said road operated by way of Polk City. You observe it is as to the public interest you are to inquire, and not merely as to the interest of Polk City and vicinity. It is as to the interest of the general public, including those who do business at and with Polk City, in traffic and travel over said road, that you are to consider. In deciding this issue, you will take into consideration the wants of the general public in the way of railroad facilities over that road, the facilities afforded by the road operated as it is, and as it would be if operated as a main line by way of Polk City, and all facts proven, fairly tending to show whether the public interest is concerned in this matter."

"11. In order to enable the plaintiff to maintain his suit, it is not enough that he may have sustained damage by depreciation of his property at Polk City or otherwise; or that other citizens of Polk City have sustained such damage by the change in location and operation of the road. It must further appear that the public interest requires the road to be operated upon the original line; or, if there is no public interest which has received detriment, there has been no breach of a public trust or duty on the part of the defendants, or either of them."

"12. The public interest, which must have received detriment by the change in the location and operation of the railroad, must be not merely the interest of the general public of Polk City or its vicinity, but of the general public, or the people of this state, who use defendant's

Crane v. The Chicago & N. W. Ry. Co.

line of railway for traffic or travel ; and if this general interest will not be promoted by the relocation and operation of the road upon the original line, then the plaintiff cannot maintain this suit, even though the jury should find that it would be for the interests of the plaintiff and other citizens of Polk City to have the railway maintained and operated over the original line."

I. The defendants filed a motion for a new trial upon several grounds, among which are that the verdict is not in accord with the foregoing instructions, and that, under the evidence and said instructions, the verdict should have been for the defendants. This motion was sustained, but upon what ground we are not advised. If, however, any single ground of the motion is well taken, the ruling of the court must be sustained. The instructions, whether right or wrong, constitute the law of the case, and it was the duty of the jury to follow them. The instructions lay down the rule that, unless the interests of the general public have been injuriously affected by what the defendants did, then the plaintiff is not entitled to recover. There is no evidence tending to show that the interests of the public have been prejudicially affected. Fairly considered, we think the evidence shows that the general public have been benefited by the change made in the location of the road. Therefore, the verdict is against the instructions of the court, and the court rightly held that the defendants were entitled to a new trial.

II. Counsel for the appellant insist that the foregoing instructions are erroneous, and it is insisted that

2. **MANDAMUS:** by private citizen to control location of railroad : public interest the test. we determine this question now, so that both parties may be advised as to their rights when another trial is had. It is provided by statute that the "order of *mandamus* is granted on the petition of any private party aggrieved" (Code, sec. 3377); and, conceding that *mandamus* is the proper remedy, the inquiry is whether a private person may pursue such

Crane v. The Chicago & N. W. Ry. Co.

remedy without regard to the public interest, or in disregard thereto. It is said that the weight of authority sustains the proposition that "where the question is one of public right, and the object of a *mandamus* is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such is interested in the execution of the laws." High Extr. Rem., secs. 431, 432. This being so, it seems to us that it necessarily follows that, unless the public interests have been injuriously affected, a private individual cannot insist that a public right or duty be enforced. If he can, it must logically follow that he may do so when the public interests have been benefited, and thus compel the performance of a duty which the general public have waived or acquiesced in and expressly recognized what has been done. For instance, if the plaintiff is successful in this action, the defendant will be compelled to construct and operate its main line of road by Polk City. Now, it may, for the purpose of argument, be assumed that this would injuriously affect the interest of the general public, and that the representatives of the general public do not desire that the main line of the road should be so operated. In such case, why should the plaintiff have the power to enforce such duty? On the sole ground, we presume, that his private interests have been injuriously affected, when the public interests possibly have been benefited. Whatever right the plaintiff has must be grounded on the fact that performance of a public duty is cast on the defendant. There is not, and never was, a duty or obligation based on any contract existing between the plaintiff and either of the defendants. But the theory of the plaintiff is that, when one of the defendants accepted the tax on the condition upon which it was voted, it became the duty of such defendant and its successors to construct and operate the road in accordance with the conditions upon which the tax was voted,

The State v. Stewart.

and that he may enforce such public duty in this action, if he shows that he has suffered private damage because of the defendants' failure. This will be conceded, if the public interests have also been injuriously affected, and not otherwise. If this is not so, then, under the pretense of vindicating and enforcing a public right, a private individual might inflict great and possibly irreparable injury on the general public. This, it seems to us, he should not be permitted to do in a case like this. The case under consideration is materially different from one where an officer is entitled to compensation which another officer refuses to pay. In such case the former may clearly have *mandamus* to enforce the payment of such compensation. Other cases of a similar character may no doubt be suggested. In the case at bar there is no private right, but, it will be conceded, a public right or duty which the plaintiff seeks to enforce. This he cannot do unless the public interests have been injuriously affected, and, therefore, the instructions above set out are correct. The instructions, of course, were given on the theory that there was evidence tending to show that the accommodations afforded by the defendant by running trains to and from Polk City were fairly and substantially sufficient for all the purposes of trade and the accommodation of passengers to and from Polk City. The plaintiff and other citizens thereof have not been deprived of railroad facilities.

The judgment of the district court must be

AFFIRMED.

THE STATE V. STEWART *et al.*

1. **Venue : CHANGE OF : PREJUDICE OF COUNTY : DISCRETION OF COURT.** Where a change of venue was asked on the ground of the prejudice of the inhabitants, and supported by the affidavits of forty-six persons, and resisted by the affidavits of seventy-three persons, *held* that there was no abuse of the court's discretion in overruling the application.

The State v. Stewart.

2. ——— : ——— : COUNTY A PARTY : WHEN NOT. A change of venue cannot be demanded, under section 2590 of the Code, in an action upon a forfeited recognizance of one charged with a crime, on the ground that the action is for the benefit of the school fund, and that, therefore, the county is the real party in interest. (Compare *State v. Merryhew*, 47 Iowa, 114).
3. Practice : ORAL AGREEMENT OF ATTORNEYS : EVIDENCE. Under section 213 of the Code, an agreement between the attorneys in a case affecting the rights of clients cannot be established by oral evidence, except the admission of the attorney whose client is to be charged by the agreement.
4. Sureties : ON APPEARANCE BOND : DISCHARGE : DELAY IN ARRESTING THE ACCUSED. Sureties on an appearance bond are not discharged by the failure of the sheriff to arrest the accused, by service of a warrant placed in his hands for that purpose, immediately upon his conviction and sentence to pay a fine ; even though the delay of the sheriff is in obedience to instructions from the district attorney, given for the purpose of enabling the accused to make some arrangements with the board of supervisors for the payment of the fine ; for such board has no authority to enter into any arrangements in reference thereto.
5. ——— : ——— : ——— : NEGLECT TO ARREST ACCUSED AFTER CONVICTION. Where the accused is on bail, and is present at the term of his trial and conviction, and remains until the adjournment of court, and is not arrested or called on to surrender himself during the term, this will not exonerate his bail. (Compare *State v. Kraner*, 50 Iowa, 582 ; *State v. Brown*, 16 Iowa, 316.)

Appeal from Appanoose District Court.—HON. DELL STUART, Judge.

FILED, MARCH 12, 1888.

DEFENDANT Samuel Stewart was convicted in a justice's court of a misdemeanor, and appealed from the judgment. To secure his appearance in the district court, he gave bond as required by section 4698 of the Code. He was tried at the March term, 1886, of the district court, found guilty, and adjudged to pay a fine and costs. At the October term, 1886, he was adjudged to be in default for failure to surrender himself in satisfaction of the judgment. This action is brought on the bond given as aforesaid, which was executed by said Samuel Stewart and his co-defendants, Lizzie and Anna Stewart. The cause was tried to a jury, and verdict and judgment rendered for plaintiff. The defendants appeal.

The State v. Stewart.

T. M. Fee, for appellants.

C. F. Howell and Tannehill, Vermilion & Haynes,
for appellee.

ROBINSON, J.—I. Defendants filed in the district court an application for a change of the place of trial, and, as grounds therefor, alleged (1) that the

1. VENUE :
change of:
prejudice of
county : dis-
cretion of
court.

inhabitants of Appanoose county were so prejudiced against them that they could not obtain a fair trial in said county; (2) that Appanoose county is a party to the action, and the real party in interest. The application was overruled. In this we discover no error. The first ground was supported by the affidavits of Lizzie and Anna Stewart and forty-four others, residents of the county, and was resisted by the counter-affidavits of seventy-three persons, who stated that in their opinion the defendants could get a fair and impartial trial in that county. The court was required to decide the application on this ground, in the exercise of a sound discretion, and the record fails to show that such discretion was abused. The second ground of the application is within

2. — : — :
county a
party : when
not.

the rule announced in *State v. Merrihew*, 47 Iowa, 114, and was insufficient. The fact that the application alleged that the county was a party is not material. The pleadings showed that the statement was not true, within the meaning of section 2590 of the Code.

II. The defendants offered to prove by the attorney who represented Samuel Stewart in the district court when the criminal case was there tried, and

3. PRACTICE :
oral agree-
ment of
attorneys :
evidence.

judgment rendered, that, immediately after the rendition of the judgment, he had agreed with the district attorney that Stewart should not be arrested, nor the judgment against him be in any manner enforced, until after the April meeting of the board of supervisors. The objection of plaintiff to the offered evidence, on the grounds

The State v. Stewart.

that it was incompetent, irrelevant and immaterial, was sustained. In this there was no error. Section 213 of the Code provides that no evidence of an agreement of an attorney to bind his client is receivable "except the statement of the attorney himself, his written agreement, signed and filed with the clerk, or an entry thereof upon the records of the court." We have had occasion to construe this provision in several cases. *Hiller v. Landis*, 44 Iowa, 224; *Sapp v. Aiken*, 68 Iowa, 701. It is clear that the proposed evidence was not competent.

III. The defendants offered to show that a warrant for the arrest and commitment to jail of Samuel Stewart was issued and placed in the hands of the proper sheriff for service, during the term of the district court at which said Stewart was convicted, and while he was present; that after he received such warrant the sheriff was instructed in writing by the district attorney to hold the same until after the April session of the board of supervisors; and that the sheriff acted upon the instruction so received, and made no attempt to serve the warrant until after the April session of the said board. The offered evidence was excluded, on the objection of plaintiff. Had it been received, it would have tended to show that proceedings under the judgment which imposed a fine on Stewart were stayed for the purpose of allowing some arrangement for its payment to be made with the board of supervisors. It is insisted by appellants that such an extension of time as they proposed to prove would operate to release the sureties on the bond in suit. Whether that effect would follow depends upon whether it was made by competent authority, and without the knowledge and consent of the sureties. The proceeds of the fines, when paid, would become a part of the temporary school fund. Code, sec. 1838. It was payable to the county treasurer, and, when so paid, became subject to apportionment by the board of supervisors. Code, sec. 1841. But until such payment was made the board had no jurisdiction

4. SURETIES : ON
appearance
bond :
discharge :
delay in
arresting the
accused.

The State v. Stewart.

of the fine, and certainly had no authority to agree to terms for its payment. The governor alone has power to remit fines. We conclude, therefore, that the district attorney would have no authority to suspend proceedings under the judgment for the purpose claimed. But the action of the district court in excluding the evidence under consideration may be sustained on another ground. The instructions claimed to have been given by the district attorney directed the sheriff to hold the warrant until after the April session of the board of supervisors. They did not recite any agreement to suspend proceedings, and no fact was shown which would have prevented the payment of the fine, or the surrender of the defendant, in the criminal case, by his bail. The fact that the sheriff did not at once serve the warrant when it came into his hands would not release the bail. *State v. Kraner*, 50 Iowa, 582.

IV. The defendants complain of the refusal of the district court to give an instruction as follows: "If the jury find that said Samuel Stewart was in
 5. —: —: neglect attendance at the March term, 1886, of the
 to arrest accused after district court of Appanoose county, Iowa,
 conviction. and was present when the judgment was rendered against him, and remained present during said term until its adjournment, and was not arrested by the authority of the state of Iowa to satisfy said judgment, or for imprisonment, before the adjournment thereof, thereon, or was not called at said term of court to surrender himself in execution of said judgment, but left the court because it adjourned, you should find for the defendants." The bond in suit is in the statutory form, and undertakes that "Samuel Stewart will appear in the district court of said county at the term thereof to which the appeal is returnable, and abide the judgment of said court, and not depart without leave of the same, or that we will pay the sum of one hundred dollars to the state of Iowa." So far as it is involved in the foregoing instructions, we see no difference between the legal effect of this bond and of those provided for by sections 4574 and 4585 of the Code. In *State v. Kraner*,

The State v. Stewart.

supra, where the defendant was convicted of the crime of nuisance, and adjudged to pay a fine of fifty dollars and costs, we held that the bail was not exonerated, although the defendant was permitted to go at large after the judgment was entered. In that case the bail had requested the sheriff to arrest the defendant, and had been refused. The case of *State v. Brown*, 16 Iowa, 316, is also an authority against the claim of defendants. We do not think the conditions of the bond were fulfilled by the attendance of the principal at the term of court to which it especially referred. It was the duty of the obligors to have their principal at all times ready to answer to the judgment of the court, until they had surrendered him as provided by law, or until the fine was satisfied.

V. Defendants complain of a paragraph of the charge to the jury relating to the burden of proof. The language of the paragraph is not to be commended ; but in the opinion of the majority of the court, when considered in connection with other portions of the charge, it could not have misled the jury.

VI. Other questions are discussed by counsel, which need not be set out at length. We have considered them, and find no prejudicial error involved.

AFFIRMED

REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DES MOINES, MAY TERM, A. D. 1888,
IN THE FORTY-SECOND YEAR OF THE STATE.

PRESENT :

HON. WILLIAM H. SEEVERS, CHIEF JUSTICE.	
HON. JOSEPH R. REED,	}
HON. JAMES H. ROTHROCK,	
HON. JOSEPH M. BECK,	
HON. GIFFORD S. ROBINSON,	
	JUSTICES.

BELL V. THE CHICAGO, BURLINGTON & QUINCY
RAILWAY COMPANY.

1. **Railroads : RIGHT OF WAY : DAMAGES : EVIDENCE.** In an action for the recovery of damages for right of way taken by a railroad company, all evidence is admissible which tends to show the jury the true condition of the land, and all its surroundings which affect the value and convenience of its use, and how such value and convenience are affected by the condemnation for right of way. (See opinion for illustrations.)

74	343
106	634
74	343
113	495
74	343
116	85
74	343
131	681

Bell v. The Chicago, B. & Q. Ry. Co.

2. — : — : INSTRUCTION. In such case, where the court instructed the jury that they should not consider the amount allowed to plaintiff by the sheriff's jury, *naming the sum*, held that, if there was any error in naming the sum, it was one not prejudicial to defendant.
3. — : — : EVIDENCE: RIGHT TO UNDER-CROSSING. In such case, the fact that plaintiff had always crossed from one part of his land to the other, beneath defendant's trestle-work, tended to show a right so to cross, so that such right was properly recognized in instructions submitted to the jury.
4. — : — : RIGHT TO CROSSING. In estimating the damages in such case, the right of the land-owner to a crossing from one part of his land to the other should be considered.
5. INSTRUCTIONS: AS TO MATTERS NOT DISPUTED. It is not error to fail to instruct the jury as to a matter about which there is no dispute and as to which the jurors can have no doubt.

Appeal from Wapello District Court.—HON. CHARLES D. LEGGETT, Judge.

FILED, MAY 8, 1888.

Ad quod damnum proceedings to condemn lands to be used by the defendant as a turn-out or derailing track. The sheriff's jury allowed the plaintiff one hundred and forty-five dollars. On appeal a judgment upon a verdict for plaintiff for \$632.50 was had. Defendant now appeals to this court.

T. B. Perry, for appellant.

A. C. Steck, for appellee.

BECK, J.—Upon the land in question defendant has constructed a derailing track, upon which trains are run when necessary to prevent collisions. It leaves the main track of defendant's road upon a curve, and, after its direct course is attained, it is nearly at right angles therewith. It is seventeen hundred and forty feet long, measured from the main track by the curve. The lands of plaintiff are situated upon the bank of the Des Moines river, which defendant's road crosses on a single-track bridge. On both sides of the river there

Bell v. The Chicago, B. & Q. Ry. Co.

is a double track, which creates the necessity for the derailing track. Immediately below or south of the bridge a creek enters the river, along which, for no great distance, the railroad is built. The defendant of course acquired the right of way for its main track. It also has acquired a right of way for the construction of a channel for the creek, which, as near as we can determine, is eight hundred or nine hundred feet long where the derailing track crosses it. The land condemned for the derailing track is eight hundred feet long, and one hundred feet wide. The abstract does not show clearly the width of the land occupied by the right of way for the channel of the creek. It is not important that it be accurately stated. The railroad track, before reaching the bridge, passes over trestle-work, and the derailing track, in passing over the channel of the creek, is upon the same kind of work. The embankment and trestle-work on the main line are about fifteen feet high, but on the derailing track they are not of that height. The plaintiff owns land on both sides of the railroad. The derailing track passes no great distance from the river bank, and is between the main body of plaintiff's land on that side of the railroad and the river. The only way of crossing is under these tracks, through the trestle-work; the right of way of the main track, and the right of way for the channel of the creek being fenced, the fence of the last running to the trestle-work over which the road runs. The derailing track is not fenced. The defendant, before the trial, filed in the case a paper declaring that the right of way of the derailing track shall not be fenced, and that by this declaration it shall be bound in the future, but in the same paper denies plaintiff's right to a crossing over or under the tracks of its main line, or over the grounds condemned for the channel of the creek.

I. Evidence was admitted, against defendant's objection, tending to show that defendant maintained a fence on the south side of the creek

1. RAILROADS :	channel, and on the north side of the right
right of way :	of way of the main line, and that land
damages :	
evidence.	

Bell v. The Chicago, B. & Q. Ry. Co.

situated as plaintiff's, and subject to overflow, is under cultivation; and other evidence tending to show the value of the strip of land between the derailing track and the river. Separate objections are made to this evidence on the ground of immateriality. We think it was all rightly admitted. It served to disclose the true condition and value of the premises in question, and the extent to which they would be affected by the condemnation. The connection of plaintiff's lands by crossings surely would affect the value of their use, and thus tend to show the diminution of their value, if any, by the condemnation. It was important that the jury should fully understand these things, as well as every surrounding circumstance and matter connected with the use and value of the land.

II. A witness for plaintiff in his cross-examination answered a question, argumentative in its form and substance, in a manner which counsel for defendant claimed was not responsive, and for that reason moved to strike out the answer. The question was not only argumentative, but was not direct. The answer was apt, and really answered the question by asking another—no uncommon manner of colloquial argument. The motion to strike out the answer was rightly overruled.

III. Many other objections to rulings admitting evidence of like character of the foregoing are complained of. The evidence in each case tended to show the jury the true condition of the land, and all its surroundings which affect the value and convenience of its use. We may say, generally, that they are correct. No useful purpose can be gained by further notice of the objections to them.

IV. The court in instructions directed the jury that they were not permitted to consider the amount
2. —: —: allowed to the plaintiff by the sheriff's
instruction. jury, naming the sum. There was no error in this, surely none prejudicial to defendant. Counsel does not claim that the finding by the sheriff's jury should be considered, but thinks the amount thereof

Bell v. The Chicago, B. & Q. Ry. Co.

should not have been stated. If the statement had any effect at all, it surely was not prejudicial to defendant.

V. An instruction directs the jury that, if they find that plaintiff had no right to a passage-way over the land occupied by the railroad tracks, he is not entitled to damage for being deprived thereof. Counsel thinks that the court should have directed the jury that no proof had been introduced sustaining such right. We are unable to say that this is the fact. It appears that, probably ever since the road was built, plaintiff did cross the railroad under the trestle-work. Such passage-way being left open by defendant, surely plaintiff would have the right to use it while open. If the right was subject to defendant's will, the instruction plainly directs that no claim can be based thereon. We think the instruction is correct. These considerations dispose of same objections to another instruction, the eighth.

VI. Another instruction, the seventh, is admitted to be correct, but is claimed not to be applicable to the facts proved. We think differently. It directs the jury that plaintiff has the right, under the laws of the state, to an adequate crossing, and if defendant should close the passage-way under the trestle it must provide another lawful crossing. This instruction was surely applicable to the facts in view of any claim on plaintiff's part for damages on account of the crossing. It is, in fact, favorable to defendant.

VII. In the eighth instruction the jury are directed that the right plaintiff had to a passage-way across the railroad tracks, or to procure such passage, should be considered in estimating the fair market value of the land before and after the condemnation, with a view to determine the damages. This right of course pertained to the land, and affected its value. The instruction is not erroneous, and in our opinion could not have been prejudicial to defendant.

VIII. Counsel thinks that the court should have informed the jury for what purpose the derailing

3. — : — :
evidence :
right to un-
der-crossing.

THE SAME.

4. — : — :
right to
crossing.

Jean v. Hennessy.

5. INSTRUCTIONS:
as to matters
not disputed.

track was used. This was made plain by the evidence, and could not have been a matter of dispute or doubt in the minds of the jury.

IX. A number of instructions were asked by defendant, and refused. They can hardly be said to be argued by counsel, who, in his brief, in most instances, contents himself to state their substance. Some of them are but repetitions of matters found in instructions given by the court. Others present matters that it was not necessary to give to the jury. We think further notice of them is not required, and that the court did not err in refusing them.

Counsel do not in argument question the sufficiency of the evidence to support the verdict. The judgment of the district court is

AFFIRMED.

74	348
78	636
78	637

74	348
91	451

74	348
101	213

74	348
102	240

74	348
126	596

74	348
137	375

JEAN V. HENNESSY.

1. **Judgment by Default : SETTING ASIDE : DILIGENCE OF ATTORNEY.** While a sufficient ground for making default must always be shown before judgment thereon will be set aside, yet a mistake of the party's attorney, even though it relates to a matter concerning which he is charged by law with notice, may afford sufficient ground of excuse. So, also, may an assurance by the judge as to the course which will be pursued in the cause, even though unauthorized, if it has in good faith been acted on by the attorney. (See opinion for illustration.)
2. ——— : ——— : **AFFIDAVIT OF MERITS : SUFFICIENCY : FORMER ADJUDICATION.** While a party seeking to set aside a judgment by default cannot rely, for a showing of merits, upon a mere general statement that he has a good defense, yet an affidavit to the effect that all the matters alleged in the petition as grounds for the action were involved and adjudicated in a former action between the same parties, is *held* sufficient.
- B. ——— : ——— : **AFFIDAVIT BY ATTORNEY.** An attorney of a party against whom judgment by default has been rendered may make an affidavit of merits, upon a motion to set it aside, when he is acquainted with the facts.

 Jean v. Hennessy.

4. **Appeal : PRACTICE : ORDER SUBSEQUENT TO ONE APPEALED FROM.**
 Where the order appealed from was one setting aside a judgment by default, *held* that this court could not consider a complaint made by appellant that appellee was permitted to file a demurrer to the petition after the judgment had been set aside, instead of an answer, as required by Code, section 2871. His remedy was to move to strike the demurrer from the files.

Appeal from Clinton District Court.—HON. A. J. LEFFINGWELL, Judge.

FILED, MAY 8, 1888.

PLAINTIFF obtained a judgment by default against defendant, which the district court on motion set aside, and the appeal is by plaintiff from that order.

A. T. Wheeler, for appellant.

Ellis & McCoy and *W. J. Knight*, for appellee.

REED, J.—I. The judgment was entered on the twenty-ninth of January, 1887, and the motion to set aside the default was filed during the same term of court. The questions arising in the case are as to the sufficiency of the showing made in excuse of the default and of the affidavit of merits. Defendant resides in the city of Dubuque, and the attorney who had charge of the cause for him in the court below also resides in that city. The action was commenced before the preceding term of the district court, and defendant's attorney appeared in the cause at that term, but filed no pleading in the cause. He applied to the court for time to plead, and time was given him, but no time was fixed within which he was required to plead. The judge stated to the attorney, however, that no further action would be taken in the cause without notice to him. The cause was then continued generally, and the attorney left the court. Under the order then in force fixing the times of holding the district and circuit courts in that district, the next term of the district court would commence about the first of March, and a term of the circuit court

1. JUDGMENT by default : setting aside : diligence of attorney.

Jean v. Hennessy.

would commence early in January. On the first of January, however, the statute abolishing the circuit court (Acts Twenty-first Gen. Assem., chap. 134), took effect; and, under section six of the act, a term of the district court would, unless some other provision was made by order of the judges, commence at the time fixed in the order for holding the circuit court. The showing made in excuse of the default is to the effect that the attorney overlooked the fact that a term of the district court would commence in January until near the end of the month, and that he relied on the assurance given him by the judge at the former term that nothing further would be done in the case without notice to him, and did not go to Clinton county until informed that a default had been taken in the case. We think the showing is sufficient. It is true that the parties were bound to take notice of the fact that, under the statute as it existed after the first of January, a term of the court would occur in that month. It is also true, perhaps, that the judge could not, by a mere parol assurance as to the course which would be pursued in the cause, bind any of the parties or conclude their rights. But an application to set aside a default is addressed to the sound discretion of the court. A sufficient excuse for making the default must be shown; but a mistake, even though it relate to a matter concerning which the party is charged by law with notice, may afford sufficient ground of excuse. So, also, may an assurance by the judge as to the course which will be pursued in the cause, even though unauthorized, if it has in good faith been acted on by the party. It is not necessarily an act of negligence to rely on such assurance. The showing brings the case within the rule of *Ordway v. Suchard*, 31 Iowa, 481.

The affidavit of merits was made by the attorney for defendant, and was to the effect that all the matters

2. — : — :
 affidavit of
 merits : sum-
 ciency : for-
 mer adjudica-
 tion.

alleged in the petition as grounds for the action were involved and litigated in a former action between the same parties. This was sufficient. It is only necessary, in such

Jean v. Hennessy.

case, to show that the party has a defense to the claim made against him. This must be done, it is true, by giving a statement of the facts constituting his defense. The party cannot rely upon a mere general statement that he has a good defense to the action. *Jaeger v. Evans*, 46 Iowa, 188; *King v. Stewart*, 48 Iowa, 334. But defendant did not rely upon such general statement, but averred the facts constituting his defense.

It is insisted, however, that the affidavit should have been made by defendant, and that the attorney was incompetent to make it. It often occurs, however, that the attorney has full knowledge of the facts constituting the defense in the case. We know of no reason why he might not, in such case, make the affidavit of merits. The statute contains no provision forbidding it, and there is no reason growing out of the nature of the case which precludes him from making it. The attorney in the present case was engaged in the former litigation between the parties, and was doubtless more familiar with the facts than was defendant himself.

Complaint is also made that the court, after setting aside the default, permitted the defendant to file a demurrer to the petition. The statute (sec. 2871) provides that one of the conditions upon which a default may be set aside is that "of pleading issuably and forthwith."

In the present case, however, when the order was made, it was agreed by the parties that defendant should have until the first day of the next term to "plead," and the agreement was embodied in the record, and the demurrer was filed at the time so designated. We are of opinion that this question cannot be considered upon this appeal. The appeal is from the order setting aside the default; but the matter complained of occurred long after the order was made, and relates to a matter which does not pertain to the order. If, as plaintiff contends, the only pleading defendant was entitled to file was an answer, his remedy was by moving to strike the

3. — : — :
affidavit by
attorney.

4. APPEAL :
practice :
order subse-
quent to one
appealed
from.

Meeker v. Meeker.

demurrer from the files ; and until the question of the right of defendant to demur has been passed upon by the lower court, we cannot determine it. The order of the district court will be

AFFIRMED.

MEEKER *et al.* v. MEEKER *et al.*

1. **Will : CAPACITY TO MAKE : EVIDENCE : OPINIONS OF NEIGHBORS.** There must of necessity be expressions of opinions by witnesses in regard to the appearance, conversation and acts of one whose mental capacity is brought in question. (Compare *Yahn v. City of Ottumwa*, 60 Iowa, 429.) And so, in this case, where it was sought to show the incapacity of the testator, *held* that the following questions addressed to witnesses who were his neighbors and acquaintances were properly allowed: "How was his appearance? What makes you think he did not know you on this day? Do you mean that his mind was simply weakened, or that it was impaired in some of its faculties? Did he get worse or better up to the last time you saw him? You may state whether he could or could not hold a conversation—an extended conversation."
2. ——— : ——— : ——— : **INDIFFERENCE TO CONVERSATIONS.** In such case evidence was properly admitted of conversations held in the testator's presence which would naturally call for some response from him, and that he remained silent, without proof that he heard them ; no proof being made that his hearing was defective.
3. ——— : ——— : **EXPERT TESTIMONY : HYPOTHETICAL QUESTIONS.** Hypothetical questions put to experts should be based upon facts which the evidence tends to prove. It is not required that they should be based upon conceded facts ; nor is technical accuracy required in framing the questions. (For application of rule, see opinion.)
4. ——— : ——— : **DEFINITION.** A person of sufficient capacity to make a will is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty ; but it is not necessary that he should have sufficient capacity to make contracts, and do business generally, nor to engage in complex and intricate business matters. (Compare *Bates v. Bates*, 27 Iowa, 110 ; *Will of Convey*, 52 Iowa, 197.)

74	352
80	578
74	352
86	729
74	352
87	263
74	352
93	602
93	614
94	349
74	352
99	297
74	352
105	574
74	352
106	213
74	352
108	156
74	352
107	751
74	352
112	228
74	352
116	259
116	263
116	607
74	352
120	845
74	352
130	183
74	352
135	438
74	352
139	238
142	43

Meeker v. Meeker.

5. ——— : ——— : EXPERT TESTIMONY : WEIGHT OF. Where the capacity of the testator was questioned, the court instructed that in such cases the testimony of medical men of large experience is, as a general rule, entitled to more weight than that of unprofessional men, but that it was still a question for the jury whether the expert testimony in the case should have more weight than that of the other witnesses. *Held* that the instruction was correct, in view of the fact that the experts were two on each side, and that these had each made a personal examination of the testator for the very purpose of ascertaining his mental capacity.
6. ——— : PROBATE : CONTEST : PROBATE REFUSED : COSTS. It is the duty of an executor to probate the will, and he should not, in the absence of a showing of bad faith, be held personally liable for the costs. And in this case, where the executors and others proposed the will for probate, but it was contested on the grounds of undue influence and incapacity, and there was a general verdict for the contestants, *held* that a motion to tax all the costs, excepting the fees of the witnesses to the will, to the proponents, was properly overruled.

Appeal from Tama District Court.—HON. JOHN L. STEVENS, Judge.

FILED, MAY 8, 1888.

THIS is a proceeding involving the validity of an instrument in writing claimed to be the last will and testament of William Meeker, deceased. The plaintiffs, being four of his sons and one son-in-law, are the legatees and devisees under the alleged will; and they presented it for probate. Two of them are named therein as executors. The defendants are two sons and a daughter of the testator who were not made beneficiaries under the will, and they contest it upon the grounds that it was obtained by undue influence, and that the decedent did not have sufficient mental capacity to make a valid will. There was a trial by jury, and a verdict that the writing signed by the deceased was not his will. From a judgment on the verdict plaintiffs appeal.

Stivers & Strong and *D. D. Appelgate*, for appellants.

Struble & Stiger, for appellees.

Meeker v. Meeker.

ROTHROCK, J.—I. The writing claimed to be a will was made and executed in August, 1886, and William Meeker died in October of the same year, aged seventy-seven years. He removed from Warren county, Ohio, to this state in the year 1856, and for many years prior to and up to the time of his death he owned and lived upon a farm in Tama county. By the will in question he disinherited the contestants. The evidence introduced upon the trial was directed mainly to his mental capacity at the time the will was made. There is no conflict in the evidence that for some years before the will was made the old man was in very feeble health, and that he had to a certain extent lost much of his former capacity for the transaction of business. At one time, by an arrangement among his children, a neighbor was selected to hold certain of his bank certificates of deposit, and transact business to some extent for him. In addition to his feeble condition, he had lost the sight of one eye, and the sight of the other was seriously affected. His condition was such that legal proceedings were instituted involving his mental capacity. This led to an examination of him by physicians and others for the purpose of ascertaining his condition. These parties were called, and examined as witnesses, and, as is usual in such cases, there was quite a conflict in their testimony. The first complaint urged in argument by appellant's counsel is that the court erred in rulings upon the admission and exclusion of evidence. Counsel for contestants propounded the following questions to witnesses for contestants: "How was his appearance? What makes you think he did not know you on this day? Do you mean that his mind was simply weakened, or that it was impaired in some of its faculties? Did he get worse or better up to the last time you saw him? You may state whether he could or could not hold a conversation—an extended conversation." These questions were objected to by counsel for proponents, and the objections were overruled. The witnesses to whom the questions were

1. WILL: capacity to make evidence: opinions of neighbors.

Meeker v. Meeker.

propounded were not physicians. They were neighbors of the decedent who were well acquainted with him, and were competent to give opinions as to his sanity. It is claimed that these questions called for opinions upon questions of which the jury were equally qualified to judge, if possessed of the same facts as the witnesses. We think the rulings of the court were correct. It seems to us quite plain that, if the witness could not reproduce the appearance of the decedent, he could not detail facts so as to put the jury in his place, so to speak. There must of necessity be expressions of opinions by witnesses in regard to the appearance, conversation and acts of one whose mental capacity is brought in question. *Yahn v. City of Ottumwa*, 60 Iowa, 429.

II. Other witnesses were allowed to detail conversations had in the presence of the decedent regarding the condition of his mind. They were such ² —: —: as would naturally call for some response from him, and he remained silent. It is insisted that these conversations were incompetent evidence, because the witnesses did not state that decedent heard what was said. There is no showing made that his hearing was defective, and we think it was a question for the jury whether he heard the conversations.

III. Both sides introduced physicians who had examined the decedent with the view of making up an opinion as to the condition of his mind. ³ —: —: Those who were introduced by proponents expressed the opinion that he was of sound mind. To one of them counsel for contestants propounded the following question on cross-examination: "Supposing Mr. Meeker had been a man of fair, ordinary ability all his life, a man of fair, ordinary intelligence and mental capacity, and providing, for a year or so prior to a given date, his mental faculties were more or less impaired,—such as the faculty of memory impaired, and forgetful,—couldn't remember things,

Meeker v. Meeker.

and he couldn't remember some of his nearest neighbors who have resided near to him for twelve or thirteen years,—providing his children, or some of them, should have a meeting in his presence, and state his mind was in such a condition that he was not any longer fit and capable of transacting his own business, and they should select an agent or guardian to take charge of his business and papers,—such as bank checks, drafts, certificates of deposit, and notes,—and should turn them over to the agent in his presence, and the old gentleman didn't make any objection to that, or to the assertion that his mind was in that condition that he was no longer fit to do business, that his physical condition was also very weak,—what would you say, then, your opinion is as to whether Mr. Meeker was of sound or unsound mind?" To another physician a question was propounded in these words: "Suppose the testator was seventy-seven years of age, providing he had been afflicted with the complaint—say for a year or so more previous to making of his will; providing his condition was such that at times he would not know some of his nearest neighbors, and his old friends and acquaintances whom he had known for thirty years; providing he had a loss of memory; providing, when people would attempt to hold conversation with him, he would stop it, saying, 'I can't remember;' providing he would not know any of his grandchildren who were with him in the evening, and stayed all night; providing he was unable to hold a connected conversation,—he would forget a few minutes afterwards what he had said a few minutes previous; providing one of his near neighbors, and a man who had been appointed and selected as his agent, would say to him, in a conversation referring to an old acquaintance at a distance, he mentioned the fact he died, and had become of unsound mind, and couldn't remember his children, and the testator should say, 'William,' referring to the neighbor, 'that is just my condition; I am no longer able to remember or know my own children one from the other;' and this physical

condition should continue which I have mentioned,—and then what would you say would be your opinion of the testator's mind as to whether it was sound or unsound?" These questions were objected to, upon the ground that they were incompetent as being without proper foundation in the evidence. The objections were overruled. Counsel for appellants claim that these rulings were erroneous, and they cite to us *Staté v. Cross*, 68 Iowa, 180. In that case a witness was sought to be impeached by expert evidence, and it was held that the hypothetical questions put to the experts should be based upon the language of the witnesses. In the case at bar the question at issue was the sanity of the decedent. It is a general rule that hypothetical questions put to experts should be based upon facts which the evidence tends to prove. In this case a careful examination of the evidence leads us to the conclusion that the questions under consideration were not objectionable. It is not required that the questions should be based upon conceded facts, nor is technical accuracy required in framing the questions. If they are entirely without the support of evidence, they should be excluded. Ordinarily, opposing counsel will not be slow, in a reëxamination of the witness, to correct the hypothesis upon which the question is based, if it be incorrect.

IV. Among other instructions, the court gave to the jury the following: "A person of sound mind, within
 4. —:—: defn-
 nition. the meaning of the law in this case, is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts, and do business generally, nor to engage in complex and intricate business matters." It is claimed that this

Meeker v. Meeker.

instruction fixes testamentary capacity as greater than is legally required. There are varying forms of expression to be found in the books in defining testamentary capacity. In *Bates v. Bates*, 27 Iowa, 110, an instruction in substance and meaning very nearly the same as that under consideration was approved by the court; and in *Will of Convey*, 52 Iowa, 197, an instruction substantially like this one was sustained. We do not think the objection to the instruction ought to prevail.

V. Another instruction directed the jury that "the testimony of medical men of large experience, as a general rule, in this class of cases, is entitled to more weight than that of unprofessional men. Still it is a question for the jury to determine whether the testimony of medical men who testified in this case is entitled to more weight than that of other witnesses." Four physicians were examined as witnesses,—two in behalf of the proponents, and two in behalf of the contestants. They were not mere experts whose testimony was founded upon facts testified to by other witnesses. They each made a personal examination of the decedent for the very purpose of ascertaining his mental capacity. In view of these facts we think the instruction complained of is correct.

VI. It is claimed that another instruction required the jury to find that, in order to sustain the will, they must find that the evidence disproved the averment of undue influence. We do not regard it as necessary to set out the instruction complained of. It appears to us that it could not have been understood by the jury as imposing upon the proponents the burden of proving that the will was not procured by undue influence.

VII. It is urged that the verdict is not sustained by the evidence. The evidence is conflicting, and we entertain no doubt that it is abundantly sufficient to sustain the verdict, especially upon the ground that the decedent was wanting in testamentary capacity.

VIII. The contestants filed a motion asking that all the costs of the trial, excepting the fees of the witnesses

Killmer v. Wuchner.

8. —: probate: to the will, be taxed to the proponents. The
 contest: pro- motion was overruled, from which ruling
 bate refused: the contestants appeal. We think, con-
 costs. sidering the facts of the case, that the ruling was correct.
 It is true, as contestants claim, that the statute (Code, sec. 2933) provides that "costs shall be recovered by the successful party against the losing party." But it is the duty of an executor to probate the will of his testator, and he should not be held personally liable for costs in the absence of a showing of bad faith or the like. Two of the parties named as proponents were the executors named in the will. It is possible, if the verdict had been based on undue influence exercised by them, they should be required to pay the costs. But the verdict was general, and an examination of the evidence leaves little doubt that it was founded upon a want of testamentary capacity in the decedent. It may be likened to a claim found among other assets of an estate. It is the duty of the executor to proceed to collect it by legal means if necessary. If he should be defeated in an action, he cannot be held personally liable for costs, unless he, in bad faith, makes them unnecessarily. *Phillips v. Phillips*, 81 Ky. 328.

AFFIRMED.

KILLMER V. WUCHNER *et al.*

1. Will: CONSTRUCTION: REPUGNANT CLAUSES. The will in question was as follows: "J. W. gives all his property * * * in care and power of his wife Dorothea, to do with said property to her best will, on condition that said Dorothea shall be bound and shall take care and see that, of the property left, she, as mother, shall get one-third, and each of the children * * * shall also have one-third as their own property. In case the said Dorothea should never marry again, then said Dorothea shall have full power and the right to use the interest of the said property for her own proper use and the use of the children. After the decease of said Dorothea, then the whole property left shall go to my children, J. J. W. and G. G. W." Held—

74	359
79	723

74	359
93	464

74	359
95	174

74	359
101	367

74	359
106	790

74	359
107	609

74	359
118	272

74	359
132	439

74	359
143	728

Killmer v. Wuchner.

- (1) That the widow and each of the children took one-third in fee.
 - (2) That the last clause, intending to direct the descent of the property after the death of the widow, was void, because repugnant to the absolute bequest of one-third to her. (Compare *Rona v. Meier*, 47 Iowa, 807.)
2. **Adverse Possession : BY TENANT IN COMMON : STATUTE OF LIMITATIONS.** The seizin and possession of one tenant in common are the seizin and possession of the others, and the statute of limitations will not operate in favor of the former to give him title by adverse possession, unless it be sole and exclusive, with the knowledge and acquiescence of the co-tenants. (Compare *Burns v. Byrne*, 45 Iowa, 285, and see opinion for application of rule.)

Appeal from Keokuk Circuit Court.

FILED, MAY 8, 1888.

ACTION in equity to quiet in plaintiff the title to eighty acres of land. The circuit court found that plaintiff was the owner of the undivided one-third of the land, and entered judgment quieting his title to that amount, and he appeals.

C. G. Johnston, for appellant.

Mackey & Fonda, for appellees.

REED, J.—The land formerly belonged to Joseph Wuchner. He died in the state of Kentucky, in 1854, leaving surviving him Dorothea, his widow, and the defendants, his children, one of whom was one year and the other three years old. He also left a will, which was admitted to probate in a court of that state having probate jurisdiction. The widow afterwards intermarried with Philip Strohman. In 1864, she and her husband executed a deed which purported to convey the land to John Killmer, and in 1866 said John Killmer executed a conveyance thereof to plaintiff. In 1862, Philip Strohman, claiming to be the guardian of the defendants, executed a conveyance of the land to John Killmer, but it is shown that he never was in fact appointed guardian, and no claim is now made under that conveyance. When plaintiff received the conveyance from John Killmer, he took possession of the land,

Killmer v. Wuchner.

which was then wild and uncultivated, and improved the whole of it, erecting buildings and fences thereon, and reducing it to cultivation; and his occupancy continued until the institution of this suit, which was in February, 1885, and during all of that time he received, and he now retains, all of the rents and profits of the place. It is contended in behalf of plaintiff (1) that by the will of Joseph Wuchner the whole estate was devised to the widow, or that she at least was empowered by it to sell and convey the property; and (2) if that was not the effect of the will that, plaintiff's possession being of the whole of the property, and under a claim of ownership of the whole, the defendants are now barred by the statute of limitations from asserting title to any portion of it.

I. The will of Joseph Wuchner is as follows:

“Joseph Wuchner gives all his property after his decease, after deducting funeral expenses, in the care and power of his wife, Dorothea Wuchner, to do with said property to her best will, on condition that said Dorothea Wuchner shall be bound and shall take care and see that, of the property left, she, as mother, shall get one-third, and each of the children born in wedlock with me by her shall also have one-third as their own property. In case the said Dorothea Wuchner should never marry again, then the said Dorothea Wuchner shall have full power and the right to use the interest of the said property left for her own proper use and the use of the children. After the decease of said Dorothea Wuchner, then the whole property left shall go to my children, John Joseph and George Gustave Wuchner. This my last will to wife, Dorothea Wuchner, and named J. J. and G. G. Wuchner, attest with my name and signature.

1. WILL; construction; repugnant clauses.

“JOSEPH WUCHNER.”

We think this will is a devise of one-third of the estate to each of the children and the like interest in fee to the widow. Under the statute in force in this state at the time of the husband's death (chap. 61, Acts 4th Gen. Assem. 1853) the widow,

Killmer v. Wuchner.

in the absence of a will, would take but a dower estate in the real estate of the husband. The intention to confer upon her an estate in fee is clearly expressed in the will; and the intention that the extent of such estate should be one-third of the property is also clearly expressed. The last clause in the will was intended by the testator doubtless to direct the descent of the property after the death of the widow. But, as it is repugnant to the absolute bequest of one-third to her, under the settled rule of construction in this state it is void. *Rona v. Meier*, 47 Iowa, 607.

We think also that the intention that the children should each take one-third of the estate is expressed in the will. That intention is expressed in the following language: "That said Dorothea Wuchner shall be bound and shall take care and see that, of the property left, she, as mother, shall get one-third, and each of the children * * * shall also have one-third as their own property." It is not entirely clear just what was intended by the preceding provisions of the will. By them the property is given unto the "care and power of the widow, and the right and power is conferred upon her" to do with said property to her best will. If the intention of the testator was to be gathered from those provisions alone, perhaps it would be said that the whole estate was devised to the widow. But in arriving at that intention all of the language of the instrument must be considered, and force must be given to all of its provisions, if that can be done under the settled rules of the law. It is clear, we think, that it was the intention of the testator that whatever rights or power were conferred upon the widow by the provisions preceding that quoted above should be controlled and limited by it, for by the express language of the clause those rights and powers were conferred on the condition named in it; so that, when all of the language is considered, the intention to be gathered from it is that each of the children should take one-third of the estate, but that the widow should have the care and control and management of it. Whether that power ceased when

Killmer v. Wuchner.

the children attained their majority it is not now material to inquire. Neither is it important to inquire whether the power is limited or controlled by the subsequent provision to the effect that the widow, in case she did not remarry, should have the right to use "the interest of the said property for her own proper use and the use of the children." We reach the conclusion that the widow took but one-third of the property under the will, and that she was not empowered by it to dispose of the interests of the children in the real estate. The deed from the widow to John Killmer, then, conveyed to him but an undivided one-third of the property.

II. As stated above, plaintiff was in possession of the property from 1866 to 1885, claiming during all that time that he was the owner of the whole of it. The defendants, however, during all of that time were non-residents of the state, and during part of the time were minors.

While they knew that their father had owned land in this state, they did not know of the attempted disposition of it by their mother and step-father. Nor did they know of plaintiff's claim of ownership, or that he was in possession of it. The facts of the case bring it within the rule of *Burns v. Byrne*, 45 Iowa, 285; viz., that the seizin and possession of one tenant in common are the seizin and possession of the others, and the statute of limitations will not operate in favor of the former to give him title by adverse possession unless it be sole and exclusive, with the knowledge and acquiescence of the co-tenants.

AFFIRMED.

HALL V. CARTER *et al.*

1. **Instructions: READING PLEADINGS NOT INCORPORATED BY COPY: ERROR WITHOUT PREJUDICE.** It is error to read to the jury the pleadings in the case, in charging the jury, when such pleadings are not copied into the instructions as a part thereof. (See Code, sec. 2788, and cases cited in opinion.) But since the issues in this case were sufficiently stated in other paragraphs of the charge, *held* that the judgment should not be disturbed on account of the error.
2. ———: **ERROR CURED BY SPECIAL FINDING.** An error in the charge of the court is no ground for reversal where, as in this case, it appears that it was without prejudice, in view of the facts specially found by the jury.
3. ———: **AS TO PROOF OF FRAUD.** It is not necessary for the jury to find that all the circumstances surrounding a transaction combine to show fraud before fraud can be found. It is sufficient if they are reasonably satisfied from all the circumstances that fraud existed; and that was the purport of the instruction given in this case.
4. ———: **PREMATURE READING IN PRESENCE OF JURY.** The fact that the court, in response to the statements of counsel as to his views of the law, made just prior to the beginning of the argument to the jury, read to counsel, in the presence of the jury, one of the instructions of the charge, *held* to be no ground for reversal; there being nothing to show any abuse of the court's discretion as to such matters, nor any prejudice to the complaining party.
5. **Jury: RIGHT TO RETURN SPECIAL VERDICT.** The jury may, in their discretion, return a special verdict. (Code, sec. 2808.)
6. **Appeal: RECORD AS TO MISCONDUCT OF COUNSEL.** This court cannot consider alleged misconduct of counsel on the trial below, when the only evidence of such misconduct contained in the record is in the form of affidavits made by the attorney of the appellant. (Compare *Rayburn v. Central Iowa Ry. Co.*, *post*, p. 637.)

Appeal from Palo Alto District Court.—HON. LOT THOMAS, Judge.

FILED, MAY 8, 1888.

74	364
90	358
74	364
93	431
74	364
97	371
74	364
108	422
74	364
110	354
110	558

Hall v. Carter.

On the twenty-third of August, 1880, the Palo Alto circuit court rendered judgment in favor of plaintiff and against defendant B. Franklin for \$142.78 damages, and \$13.50 costs. On the eleventh day of October, 1886, A. B. Carter and A. D. Franklin were served with garnishment process by virtue of an execution issued on said judgment. The answers of the garnishees, in which they denied all liability, were afterwards taken in court, and a pleading controverting such answers was duly filed. To this pleading the garnishees filed an answer.

The evidence tends to show that, for some time prior to the garnishment, a drug business had been carried on at West Bend, under the personal control of the defendant; that about the last of September, 1886, the stock of goods used in the business was sold to the garnishee A. D. Franklin, and that, on or about the eighth day of October, 1886, he sold the goods to A. B. Carter. When garnished, Carter was owing, of the price he had agreed to pay for the goods, about four hundred and thirty dollars. The case was tried to a jury, and a verdict rendered in favor of the garnishees. From the judgment rendered on the verdict the plaintiff appeals.

It is claimed on behalf of the appellant that, prior to the sale to A. D. Franklin, the drug-store was in fact owned and carried on by defendant, but that the business was done in the name of his wife, E. Franklin, or E. Franklin & Co., for the purpose of hindering and delaying the plaintiff in the collection of his judgment; that the sale to A. D. Franklin was fraudulent, made without consideration, for the purpose of placing the goods beyond the reach of the creditors of the defendant; and that the unpaid portion of the purchase price in the hands of Carter, when garnished, was really the property of defendant, and, as such, should be subjected to the payment of the judgment of plaintiff.

McCarty & Linderman and Harrison & Jenswold,
for appellant.

Soper & Allen and *Kelly & O'Connor*, for appellees.

ROBINSON, J.—I. In its charge to the jury, the district court used the following language: “The

1. INSTRUCTIONS:
reading
pleadings not
incorporated
by copy. plaintiff controverts the answers given by the garnishees, and for that purpose files the following pleading, to-wit.” The pleading referred to was not included in the

charge by copy, but was read by the court as a part of its charge. Substantially the same course was pursued in regard to the answer which the garnishees had filed to the plaintiff's pleading controverting their answers. This court has repeatedly disapproved similar practice. *Fitzgerald v. McCarty*, 55 Iowa, 704; *Bryan v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa, 465; *Porter v. Knight*, 63 Iowa, 366; *Hollis v. State Ins. Co.*, 65 Iowa, 460; *Lindsay v. City of Des Moines*, 68 Iowa, 368. It was the duty of the district court to state the issues in its charge, and this should have been wholly in writing. Code, sec. 2788. In this case the charge was, in effect, partly oral and partly in writing. The jury were not told to consult the pleadings, and could not determine what such pleadings contained from reading the written charge. They were forced to depend upon their recollection of what the court had read, or were compelled to select, from the papers submitted to them upon retiring for deliberation, the pleadings which were actually read as a part of the charge, at the risk of mistake. We do not think this is good practice. The entire record of the case satisfies us, however, that no prejudice resulted from this error of the court. The third paragraph of the charge presented the issues quite fully, and other paragraphs further presented the issues, and directed the jury as to their duties. Several special findings were returned, which indicate that the issues were fully understood by the jury. We therefore conclude that the verdict should not be disturbed on the grounds just considered. *Dorr v. Simerson*, 73 Iowa, 89.

II. The eighth and ninth paragraphs of the charge to the jury instructed them that, although they found

Hall v. Carter.

2. —: error
cured by
special finding the sale to A. D. Franklin to have been fraudulent as to creditors of the defendant, yet they could not return a verdict against Carter unless he was a party to the fraud, or had knowledge of it when he purchased the goods, or notice which should have put him upon inquiry which would have led to such knowledge. In this we think there was error. It is not claimed in the pleadings that Carter was a party to the alleged fraud, nor that he was chargeable with knowledge of it when he purchased the goods. His good faith in the transaction was not in issue, and for the purposes of this case it was wholly immaterial whether he was a party to the alleged fraud, or was chargeable with knowledge of it or not. If such fraud had in fact been perpetrated, and the goods or their proceeds were liable in the hands of A. D. Franklin for the payment of the judgment of plaintiff, Carter would be liable in this proceeding to the amount of the purchase money which remained in his hands when he was garnished. This fact was ignored in the charge. But we find that the giving of these paragraphs of the charge was error without prejudice, for the reason that the jury found specially that defendant did not own the goods when they were sold to A. D. Franklin, and that E. Franklin & Company did then own them.

III. Objection is made to the eleventh paragraph of the charge, on the alleged ground that it required the jury to find that all the circumstances surrounding the transactions in question must combine to show fraud before fraud can be found. We do not understand that to be the meaning of the language used, but, rather, that the jury may find fraud if they are reasonably satisfied from all the circumstances aforesaid that such fraud existed ; or, in other words, that their finding should be based upon a consideration of all the circumstances involved in the transactions.

IV. Objections are also made to other portions of the charge. We discover no error in any of them unless

3. —: as to
proof of
fraud. the jury to find that all the circumstances surrounding the transactions in question must combine to show fraud before fraud

Hall v. Carter.

it be the tenth paragraph; but the error in that, if any, was immaterial, in view of the special findings of the jury.

V. While the attorney for defendants was stating his views as to the law of the case, after the evidence had been submitted, and before the argument to the jury was commenced, the judge read in the presence of the jury the fourth paragraph of the charge. Appellant objects to this on the ground that the jury were virtually instructed by the reading, to the extent of the paragraph read; while they should have been instructed only after the arguments to the jury had been concluded. The paragraph in question seems to have been read for the benefit of counsel for defendants, and in response to something he had said. It was not read to the jury, and could not have been understood by them as designed to instruct them at that time. Its contents were not of a nature to prejudice plaintiff by being read in advance of the remainder of the charge. While it is sometimes desirable that the remarks of the judge and the arguments of the counsel, in regard to questions involved in a case, be not made in the presence of the jury, yet it is not always practicable nor desirable to have such questions considered in the absence of the jury. The proper practice in each case must be determined by the trial court, in the exercise of a sound legal discretion. We discover no abuse of that discretion in this case.

VI. Counsel for appellant criticise the action of the court in submitting certain special interrogatories to the jury, and object to certain special findings returned by the jury on their own motion. We discover no prejudicial error in any of these matters. The jury were authorized to return a special verdict in their discretion. Code, sec. 2808.

VII. Misconduct on the part of an attorney for defendant while making his argument to the jury is

4. — : premature reading in presence of jury.

5. JURY : right to return special verdict.

The City of Creston v. Nye.

6. APPEAL: record as to misconduct of counsel.

urged. The only evidence of the alleged misconduct contained in the record is in the form of affidavits made by attorneys for plaintiff. We held in *Rayburn v. Central Iowa Ry. Co.*, *post*, p. 637, that such affidavits were insufficient to make the misconduct of attorneys a matter of record. We cannot, therefore, determine in regard to that alleged in this case.

Other objections are discussed by counsel; but, since they involve no question of general interest, we need not refer to them in detail. It is sufficient for us to say that we have examined the record carefully, and find no error prejudicial to appellant. The judgment of the district court is, therefore,

AFFIRMED.

74 309
103 230

THE CITY OF CRESTON V. NYE. (*Two Cases.*)

Criminal Law: RIGHT TO JURY TRIAL IN SUPERIOR COURT. Since in the present condition of the law there is no appeal from the superior court of a city except to the supreme court, *held* that one charged in the superior court, upon information, with the violation of a city ordinance is entitled to a trial by jury in that court; and if, when the case matures for trial, the jury have been discharged for the term, and the defendant demands a jury trial, it is the duty of the court to continue the case on its own motion until such time as a jury can be lawfully empaneled. (See opinion for statutes construed and cases cited.)

Appeals from Creston Superior Court and from Union District Court.—HON. JOHN W. HARVEY, Judge.

FILED, MAY 9, 1888.

THE defendant was arrested upon an information filed in the superior court of Creston, charging him with a violation of a city ordinance. By an agreement the hearing of the cause was continued until July 11, 1887, at which time the defendant appeared, and pleaded not guilty, and demanded a trial by jury. The regular

The City of Creston v. Nye.

panel of jurors had been discharged for the term, and the demand for a jury trial was refused. Thereupon the cause was tried to the court without a jury, and the defendant was found guilty, and ordered to pay a fine of twenty-five dollars and costs, and to stand committed to the jail of the county for eight days unless said fine be sooner paid. The defendant then gave notice of an appeal to the district court, and the appeal-bond was fixed at one hundred dollars. The district court dismissed the appeal, upon the ground that it had no jurisdiction of appeals from the superior court. The defendant appeals from the judgment of both courts.

Hanna & Porter, for appellant.

Judson L. Wicks, for appellee.

ROTHROCK, J.—Appellant insists that he was entitled to be tried by a jury, and that, having been denied that right, he was not legally convicted. The proceeding under the ordinance was a criminal prosecution. *Jaquith v. Royce*, 42 Iowa, 406; *State v. Vail*, 57 Iowa, 103. Section ten, article one, of the constitution, provides that “in all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury.” Section six of chapter 143 of the Laws of 1876 provides that the superior court shall have “exclusive original jurisdiction, to try and determine all actions, civil and criminal, for the violation of city ordinances.” Section one of chapter seventy-seven of the Acts of 1880 provided that, “on information for a violation of an ordinance of an incorporated town or city of the second class, the defendant shall not be entitled to a trial by jury except on appeal.” Section seven of chapter 143 of the Acts of 1876 provided that, “when criminal actions are tried in vacation without a jury, an appeal will lie to the district court.” But this section was expressly repealed by section four of chapter twenty-four of the Acts of 1882, and it was enacted that “in criminal actions an appeal

The City of Creston v. Nye.

will lie to the supreme court as now or hereafter provided by law for appeals in like cases from the district court." It is conceded that the defendant had the right to a trial by jury at some stage of the proceedings, either in the superior court or upon an appeal. There can be no question that such right exists. *State v. Beneke*, 9 Iowa, 203; *Zelle v. McHenry*, 51 Iowa, 572. But section seven of chapter 143 of the Laws of 1876, which authorized an appeal to the district court, is expressly repealed by the statute last above cited. There is, therefore, no law now in force authorizing an appeal of a criminal case from the superior court except to the supreme court; and, as the superior court has exclusive jurisdiction of actions for violation of city ordinances, there can be no prosecutions for such violations where a jury trial is demanded, unless the superior court is authorized to try criminal cases by jury. We think that, under a fair construction of all these statutes, a jury may be demanded as a matter of right. It appears to us that section one of chapter seventy-seven of the Laws of 1880, which denies the right of trial by jury in incorporated towns and cities of the second class, has no reference to cities in which there is a superior court. It is not applicable to criminal procedure in superior courts. We think it was the right of the defendant to demand a jury trial, and the court was not authorized to proceed to a trial without a jury. But we do not hold that there was any authority to impanel a jury after the regular panel was discharged; and the defendant had no right to make such a demand. When a jury was demanded, the court should have continued the case on its own motion. The constitutional provision requiring a "speedy" trial must be construed in a reasonable manner. It frequently occurs in the district court that a defendant in a criminal action demands a trial after the jury have been discharged, and it has never been thought unreasonable to refuse the demand and continue the cause.

The judgment of the superior court will be reversed, and that of the district court will be AFFIRMED.

74	372
136	146

WELLS V. KAVANAGH *et al.*

1. **Evidence : ORDER OF INTRODUCTION : DISCRETION.** The order in which evidence shall be introduced is a matter largely within the discretion of the trial court, and an irregularity in that respect will very seldom afford grounds for disturbing a judgment.
2. ——— : **CONTRACT BETWEEN DEFENDANT AND STRANGER.** Where the action was for labor done and materials furnished to a subcontractor, and was brought on a contract and bond wherein the principal and sureties bound themselves to pay all just claims against the principal or his subcontractors for labor and materials furnished upon the work, *held* that a subsequent contract made between the principal and the subcontractor, whereby the latter undertook to perform all the labor and furnish all the materials, was properly excluded when offered in evidence by the defendants.
8. **Instructions : REFERRING TO ISSUES TAKEN FROM JURY.** Where some of the issues have been disposed of by the court in the course of the trial, all reference to them is properly omitted in the instructions to the jury.

Appeal from Boone District Court.—HON. D. D. MIRACLE, Judge.

FILED, MAY 9, 1888.

THIS is an ordinary action on account for work and labor performed, and goods and merchandise sold and delivered. It is alleged in the petition that defendant Kavanagh entered into a contract in writing with the Narrow Gauge Railway Construction Company for the construction of a certain railway, and that, by the terms of said contract, he agreed to pay all just claims against him, or against any subcontractor under him, for services or labor performed or materials furnished in the work done under the contract; also that he executed a bond in the sum of ten thousand dollars, with the other defendants as sureties, conditioned for the performance by him of his undertakings in the contract. Plaintiff's claim is for various items of labor and materials performed and furnished to a subcontractor, as is alleged.

Wells v. Kavanagh.

upon the work. The answer is a general denial. A number of affirmative defenses were also pleaded; but, as no question arises here upon them, they need not be set out. There was a verdict, and judgment for plaintiff. Defendants appeal.

Parsons & Perry, for appellants.

Crooks & Jordan, for appellee.

REED, J.—I. Plaintiff offered in evidence the contract between Kavanagh and the construction company; also the bond under which he sought to charge the other defendants. They were
 1. EVIDENCE: order of introduction: discretion. objected to by defendants on the ground that “it did not appear that they were the contract and bond under which certain portions of the work were performed.” The objection relates merely to the order in which the evidence should have been introduced. If, under the issue, plaintiff was required to introduce these instruments in evidence,—a question not raised,—the natural order was to introduce them before any other proof was made. They were evidence of the contract under which plaintiff claimed to recover; and, if it was essential that they should be introduced, that was the proper time for their introduction. In addition to this, questions relating merely to the order of the trial are within the discretion of the trial court, and an irregularity in that respect will very seldom afford grounds for disturbing the judgment. It is clear, in the present case, that there was no abuse of discretion.

It is insisted, however, that no evidence was introduced at any time which tended to prove that the labor and material for which plaintiff sought to recover was performed and furnished under the contract. But this objection is not well founded. There was evidence tending to prove that the labor was performed for, and the materials furnished to, a subcontractor under Kavanagh on the section of road covered by his contract with the construction company. The question as to the sufficiency of the evidence to establish those facts was for the

Wells v. Kavanagh.

jury; and, if they were established, the conclusion might fairly be drawn from them that they were done and furnished under the contract.

II. Defendants offered in evidence the contract between Kavanagh and the subcontractor for whom the labor and materials were done and furnished for which plaintiff seeks to recover, but on plaintiff's objection it was excluded. By that contract the subcontractor undertook to perform all the labor and furnish all the materials required on the portion of the work which he undertook. We held in *Jordan v. Kavanagh*, 63 Iowa, 152, which was an action on the same contract and bond, that the undertaking of Kavanagh and the sureties on the bond was that he would pay all just claims against him or his subcontractors for labor and materials done and furnished upon the work, and that suit might be brought on the bond by any person injured by the breach thereof. His liability arising under his contract with the construction company and that of the sureties on the bond was in no manner affected by his subsequent agreement with the subcontractor. Nor was plaintiff's right to maintain an action on the bond defeated by it. The contract was, therefore, immaterial, and was properly excluded.

III. The court, in stating the issues, omitted to make any reference to the affirmative defenses pleaded by defendants. But no questions arising under those allegations were submitted to the jury for determination; the court having disposed of all questions of that character by rulings made during the progress of the trial. As the questions were not to be passed upon by the jury, the court did right to omit all reference to them in the instructions. We find no error in the record, and the judgment will be

AFFIRMED.

2 — : contract
between
defendant
and stranger.

2. INSTRUCTIONS : refer-
ring to issues
taken from
jury.

Ross v. Crane.

ROSS V. CRANE.

Payment : APPLICATION OF : PRIOR AGREEMENT. Plaintiff bought horses of S., and gave him for the purchase price two notes secured by mortgage on the horses. S. at once assigned the notes and mortgage to B. The next day plaintiff agreed in writing with B. to work for him, and B. agreed to apply his wages in payment of the mortgage debt. B. continued to hold the notes and mortgage until plaintiff had earned enough to cancel the debt, but, instead of applying his wages on the debt, he applied them on another account which he held against plaintiff, and assigned the notes and mortgage to defendant, who seized the horses under the mortgage. *Held*, in an action to recover the horses, that B. was bound to apply the wages on the debt, and that the law would so apply them, and that the debt was satisfied before the assignment to defendant.

Appeal from Hamilton District Court.—HON. S. M. WEAVER, Judge.

FILED, MAY 9, 1888.

ACTION for the recovery of specific personal property. Verdict and judgment for plaintiff. Defendant appeals.

Martin & Wambach, for appellant.

Kamrar & Boeye, for appellee.

REED, J.—The property in controversy is a team of horses. Plaintiff purchased the team from Oliver Sealine, and gave his two promissory notes, for one hundred dollars each, for the purchase price, and executed a chattel mortgage on the team to secure the same. C. M. Blaine was present at the time of the transaction, and contracted with Sealine for the purchase of the notes and mortgage. He paid one hundred dollars at the time, and one of the notes was then turned over to him. Subsequently, at different times,

Ross v. Crane.

he paid the balance of the amount agreed to be paid for them, and the other note and the mortgage were delivered to him. He subsequently sold the notes and mortgage to defendant, who seized the property on the mortgage. Plaintiff then brought this action, claiming that he had paid the amount of the notes to Blaine before the sale to defendant. On the next day after the purchase of the team from Sealine, plaintiff entered into a contract in writing with Blaine, whereby he agreed to gather and collect cream for him from that date (May 20) to the first of October following. Blaine's undertaking in the contract is expressed in the following language: "In consideration for the services of said G. S. Ross, as above described, said C. M. Blaine hereby covenants and agrees to pay the said G. S. Ross, to be by him applied as set forth below at the end of each month, the sum of two and one-half cents per inch for all cream collected and delivered by him according to the terms of this contract. The first one hundred and fifty dollars earned by and due to the said G. S. Ross, under and by virtue of this contract, is to be applied to and paid the said C. M. Blaine upon a note given by said G. S. Ross to Oliver Sealine." Plaintiff performed labor under the contract, and his earnings amounted to more than one hundred and fifty dollars. He was indebted, however, to Blaine on account for goods sold him, to the amount of \$160.72, and the latter claimed the right to apply that amount of the earnings in satisfaction of that indebtedness, and he did give him credit for that amount on his books. He also credited the balance of the earnings, together with a small amount he was owing plaintiff on another account, on one of the notes. If, in addition to that sum, the one hundred and fifty dollars first earned by plaintiff under the contract had been credited on the notes, the debt would have been satisfied. Defendant claimed that there was a subsequent parol agreement between plaintiff and Blaine to the effect that the earnings of the former under the contract were first to be applied on the

Ross v. Crane.

account, and that the residue, after that debt was satisfied, should be credited on the notes. That question was submitted to the jury, and their verdict implies a finding against defendant upon it. The district court instructed the jury, in effect, that, if the alleged modification of the contract was not established, the earning by plaintiff of one hundred and fifty dollars under its provisions was a payment, to that amount, of the mortgage debt.

The only question in the case demanding consideration is as to the correctness of that ruling. It may be conceded that the contract between plaintiff and Blaine did not modify the notes. The contract evidenced by them was an agreement to pay in money, and that agreement was not changed to one to pay in labor by the contract. The contract, too, was executory. But Blaine was the owner of the notes when the contract was made, and he continued to own them when the money was earned. His covenant was that he would apply and pay it, when earned, upon the notes. As he was the owner of the notes when it was earned, the effect of the agreement was that he was to keep it in satisfaction of the debt, rather than to pay it over to plaintiff, to whom, in the absence of the agreement, it would have been due. Nothing further remained to be done to effect the objects of the contract. It was in the hands of the one to whom the payment was due, and it was there for the purpose of payment, and the payment was accomplished by that fact. The fact that credit was not endorsed upon the notes is immaterial. The endorsement would have been evidence merely of the application of the money; but the application itself was accomplished, under the terms of the contract, when the money was earned by plaintiff.

AFFIRMED.

74	378
82	539
74	378
96	49
100	309

MAGARRELL V. MAGARRELL. (*Two Cases.*)

1. **Domestic Relations: COMPENSATION TO MEMBERS OF FAMILY FOR SERVICES.** Three brothers were living together in the same house, and engaged in cultivating their farms as partners. Their mother and another brother lived with them as members of the same family, the former doing the household work, and the latter working at farm labor, and both had their living in the family at the expense of the three brothers, who were partners. But, in actions against the estate of one of the deceased partners for compensation, they clearly established the fact that their services were worth much more than their living, and were rendered with the expectation on their part, and on the part of the partners, that a fair compensation would be made therefor, though no agreement was ever had as to the amount of such compensation. *Held* that, in order to a recovery, it was not necessary to show an express contract to pay for the services. (*Scully v. Scully's Ex'r*, 28 Iowa, 548, *distinguished*; and see *Cowan v. Musgrave*, 73 Iowa, 384.)
2. **Appeal: PRACTICE: NEW PARTY AS APPELLEE'S ADMINISTRATOR.** Although there is no showing anywhere in the record of this case that the appellee had died, or that Y. had been appointed as his administrator, the latter appeared, apparently without objection, as administrator, in the court below, and made a motion for the approval of the report of the referee, which was sustained. *Held* that, upon such a showing, he had no such interest in the cause as to entitle him to have stricken from the record in this court the evidence which the real parties in interest had agreed to be correct, but that his motion to strike should itself be stricken from the files upon the motion of appellants.

Appeals from Cass Circuit Court.

FILED, MAY 9, 1888.

THESE cases involve similar questions of law and fact, and are considered together. They arise out of claims filed by plaintiffs with defendant as the administrator of Joseph Magarrell, deceased. These claims were submitted by the circuit court to a referee to inquire into and report upon their validity. The referee reported to the court the evidence and his findings of

Magarrell v. Magarrell.

fact. He also reported his conclusions of law, which were that the claims were based on services rendered for a partnership of which decedent was a member, and that they could not be enforced for want of an express contract with decedent for their payment. Objections to the report of the referee were filed by appellants and overruled by the court. Judgment confirming the report of the referee was rendered, and from this the plaintiffs appeal.

H. G. Curtis, for appellants.

Willard & Fletcher, for J. C. Yetzer, administrator, appellee.

ROBINSON, J.—The referee found the facts in regard to the claim of George Magarrell to be substantially as follows: From the beginning of the year 1877 until the death of decedent, John Magarrell, Robert Magarrell and decedent resided in Cass county, Iowa, and owned adjoining farms. Within one or two years from April, 1877, they began farming their lands in partnership, and continued to so farm them until the death of Joseph. George Magarrell worked on these farms from April, 1877, until they were farmed in partnership, and then worked for the partnership while it lasted. During this time George was unmarried, and made his home with his brothers, the members of the partnership. His clothing and spending money, indefinite in amount, were provided for out of the sale of products of the lands farmed in partnership. He was treated by the partners as they treated each other, except that he had no interest in the business. He had a mare and colt raised on the farm, and was in every way treated as a member of the family. There was never any accounting nor settlement between George and the partnership prior to the death of Joseph. No express contract was made with George for his services, nor for the amount of wages he should receive, nor were wages paid to him. At various times there were conversations in regard to his receiving land for his services, but no express contract was made

Magarrell v. Magarrell.

as to value or quantity of the land he was to receive, nor did decedent engage in such conversations. The referee found the facts in regard to the claim of Jane Magarrell to be as follows: In April, 1877, she and her husband began to make their home with their sons, John, Robert C. and Joseph Magarrell, in a house on the farm of John, in Cass county. Their sons supplied the home so made with groceries, provisions, clothing and other family necessities from the sale of the products of their farms, without any contribution by the parents. The mother performed the necessary household labor, often marketing the butter and eggs and applying their proceeds as she saw fit. She and her husband were provided with food and clothing, and shared the home so made equally with the sons. Conversations were often had in the family in regard to the mother's being compensated for her services as housekeeper, but no agreement was ever made nor rate of wages fixed, nor was there ever any accounting or settlement for her services. No express agreement was made between the mother and decedent that she should be paid for her services, and no express provision was made by him that he would pay anything on account of them, but such a promise might be implied by one conversation established by the evidence. In addition to the facts found by the referee, the evidence set out in the abstract shows that George Magarrell was an excellent farmhand, whose services were worth not less than twenty dollars per month for the eight or nine years in controversy. His mare was worked on the farm, and the value of her work was equal to the value of the clothes and amount of spending money received by him, and was so considered by the brothers. Both of the surviving partners testified that George was to receive pay for his work, and that they had paid him about sixteen hundred dollars as their share on settlement made since the death of Joseph. It also appears that the parents left their own home at the request and for the benefit of the three brothers who were in partnership. The services of the mother were worth not less than four dollars per

Magarrell v. Magarrell.

week, and the father paid for his support by doing chores. The mother was told repeatedly that she would be paid for her labor, although no amount was fixed.

I. The conclusion of law reached by the referee and confirmed by the court seems to have been that, in view of the relationship existing between the several parties to the transactions in question, an express agreement to pay for the services rendered must be shown to justify an allowance of the claims in suit. We

1. DOMESTIC
relations:
compensation
to members of
family for
services.

do not think this conclusion was warranted by the facts of the case. While it is true that both claimants lived with the partners, yet it was under such circumstances as to rebut any presumption which might arise from their relationship that the services rendered were to be an equivalent for the home and supplies furnished, or that they were rendered without charge. The home and supplies were no just equivalent for the services, and were never so treated nor considered by the parties in interest. On the contrary, it was understood at all times that other payment for the services was to be made. Under the facts disclosed, there was no obligation on the part of either claimant to serve the partners without charge. In *Scully v. Scully's Ex'r*, 28 Iowa, 548, we held that "when it is shown that the person rendering the service is a member of the family of the person served, and receiving support therein, either as a child, a relative or a visitor, a presumption of law arises that such services were gratuitous, and, in such case, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of rendering, compensation therefor." It seems to us that the claimants clearly established the fact that their services were rendered with the expectation on their part, and on the part of the partners, that a fair compensation would be made for them. Hence it was not necessary to

Magarrell v. Magarrell.

show an express contract to that effect. As bearing upon this point, see *Cowan v. Musgrave*, 73 Iowa, 384.

II. An "amended abstract," brief, motion to strike the evidence from the abstract of appellants, and written argument in support of such motion, have been filed by "J. C. Yetzer, administrator of the estate of Robert Magarrell, deceased." It is contended by appellants that this party is a stranger to the record, and ought not to be permitted to dispute the correctness of the abstract, which was agreed to be correct by the real parties in interest, as shown by the record. The abstract of appellants shows that J. C. Yetzer, administrator, first appeared in the circuit court after the referee had filed his report, with a motion to affirm that report. The judgment refers to the motion, and affirms it, and notice of appeal was served on his attorneys. His right to appear in the proceedings does not appear to have been questioned in the circuit court, and the question for our determination is whether he has such an interest in the matter in controversy as to entitle him to the relief he demands in this court. Although he has filed what he terms an amended abstract, he has added nothing to the abstract of appellants which throws any light on his connection with the case. The only Robert Magarrell disclosed by the record is the defendant. His death is not shown, nor is the qualification of Yetzer as administrator of the estate of any person either alleged or proven. Under these circumstances, we do not think that this so-called administrator should be presumed to have such an interest in these proceedings as to entitle him to have stricken from the record the evidence which the real parties in interest agree properly belongs in it. His motion is, therefore, denied, and the motion of appellants to strike it from the files is sustained. For the errors indicated, these causes are

REVERSED.

2. APPEAL: practice: new party as appellee's administrator

Connors v. The Burlington, C. R. & N. Ry. Co.

CONNORS V. THE BURLINGTON, CEDAR RAPIDS &
NORTHERN RAILWAY COMPANY.

1. **Jury Trial : RIGHT TO IN SUPERIOR COURT : TRIAL BY TWELVE : CONDITIONS.** The constitutional right to a trial by a jury composed of twelve persons is not violated by section sixteen, chapter 148, Laws of 1876, as amended by section six, chapter twenty-four, Laws of 1882, providing that the jury for the trial of causes in the superior court shall consist of six qualified jurors, unless one of the parties demands a jury of twelve ; but that the party making such demand, to entitle him to a trial by twelve, must deposit with the clerk an amount sufficient to pay the additional expense caused thereby. (Compare *Adae v. Zangs*, 41 Iowa, 586 ; *Steel v. Central Iowa Ry. Co.*, 43 Iowa, 109.)
2. **Instructions : ISSUES ELIMINATED FROM CASE.** Where an instruction asked is relevant to an issue made by the pleadings, but is not pertinent to the case as made by the evidence, and the question to which it relates has been eliminated from the case by the instructions given, such instruction should be refused.
3. **Railroads : DEATH OF BRAKEMAN : RISKS ASSUMED : HIGH SPEED.** In an action for the death of a brakeman, where there was evidence tending to establish the claim that, owing to the condition of the track, the defendant was negligent in running its train at so great speed, *held* that it was error to give an instruction which expressed the doctrine that the decedent assumed the risk of the dangers incident to the speed at which the train was run ; the dangers assumed by decedent being such only as were incident to the operation of the road in a reasonably prudent and careful manner.
4. **Instructions : TAKING CASE FROM JURY : DUTY OF COURT.** It is error for the court to instruct the jury that if they find a certain state of facts the plaintiff cannot recover, when the uncontradicted evidence establishes that very state of facts. In such case it is the duty of the court to direct a verdict for defendant.
5. **Appeal : PRACTICE : CHALLENGING RECORD AFTER AMENDMENT.** Where appellee, in an amended abstract, set out portions of the evidence which he claimed were omitted from appellant's abstract, *held* that he could not then be permitted to deny that the evidence was properly preserved, or to say that it was not all before the court. (See cases cited in opinion.)

74	383
82	265
74	383
87	148

74	383
103	197

74	383
116	708

74	383
118	150

74	383
127	731

Conners v. The Burlington, C. R. & N. Ry. Co.

Appeal from Cedar Rapids Superior Court.—HON.
JOHN T. STONEMAN, Judge.

FILED, MAY 10, 1888.

ACTION for the recovery of damages on account of the death of plaintiff's intestate, who was killed while in defendant's employ as a brakeman by the derailing of the train on which he was employed. There was a general verdict for plaintiff. The jury also returned certain special findings on which defendant moved for judgment, notwithstanding the general verdict, which motion was sustained by the superior court. On plaintiff's appeal that judgment was reversed, and the cause remanded. (See 71 Iowa, 490.) Plaintiff then moved in the superior court for judgment on the general verdict, which motion was sustained and defendant appeals.

S. K. Tracy, for appellant.

Bowman & Swisher, for appellee.

REED, J.—I. The defendant filed a plea to the jurisdiction of the superior court on the ground that it was entitled to have the cause tried to a jury of twelve. It did not, however, deposit or offer to deposit any sum of money with the clerk to pay the additional expenses which would be caused by a trial to a jury of that number. Section sixteen, chapter 143, Acts of Sixteenth General Assembly, as amended by section six, chapter twenty-four, Acts Nineteenth General Assembly, provides that the jury for the trial of causes in the superior court shall consist of six qualified jurors, unless one of the parties demands a jury of twelve, but that the party making such demand must, to entitle him to a trial to a jury of that number, deposit with the clerk an amount sufficient to pay the additional expenses caused thereby. It was contended that this provision is in conflict with section nine of the bill of rights, which declares that "the right of

1. JURY trial:
right to in
superior
court: trial
by twelve:
conditions.

Connors v. The Burlington, C. R. & N. Ry. Co.

trial by jury shall remain inviolate." It has been held that the jury contemplated by that provision is the jury as constituted at common law, consisting of twelve persons. *Eshelman v. Chicago, R. I. & P. Ry. Co.*, 67 Iowa, 296; *Kelsh v. Town of Dyersville*, 68 Iowa, 137. It has also been held, however, that it is not violated by a requirement that the party who enjoys the right received by it pay the expense incident to such enjoyment. *Adae v. Zangs*, 41 Iowa, 536; *Steel v. Central Iowa Ry. Co.*, 43 Iowa, 109. The statute in question does not deny the right. It simply requires the party who would enjoy it to secure the public against the cost and expense incident to his enjoyment of it.

II. The accident in which the intestate was killed occurred on a curve in the track of defendant's road, near Northwood. A side track was connected with the main track by a switch at the curve. The locomotive and the seven leading cars in the train were thrown from the track, and the engineer and the intestate, who was first brakeman, were caught in the wreck, and killed. The allegations of negligence contained in the petition are that the track at the point where the accident occurred was constructed and left in a dangerous condition; that the train was being run at the time at a dangerous and reckless rate of speed, and at a rate forbidden by the rules of the company; and that the engine was new and stiff, and did not readily adapt itself to the curve in the track. On the trial the defendant asked, but the court refused to give, the following instruction:

"It is claimed by plaintiff that the accident happened on a curve, and that the locomotive was new and stiff, and would not readily adapt itself to the curve where the accident happened. You are charged as to this that if, at other times before this, this locomotive had been run over this curve attached to freight trains, without difficulty or accident, and that it then adapted itself to this curve, then the fact that the engine was new and stiff would not be sufficient to justify you in

Conners v. The Burlington, C. R. & N. Ry. Co.

finding defendant guilty of negligence in using it to haul freight trains at the place where the accident happened."

We do not find it necessary to inquire whether this instruction correctly expresses the law, for in no event was the defendant prejudiced by the refusal to give it. Plaintiff did not offer any evidence of the condition of the engine, and the court, on its own motion, instructed the jury that plaintiff was not entitled to recover unless he had proven that defendant was guilty of negligence, either in the operation of the train or as to the condition in which the track was maintained, and the injury was caused by such negligence. While the instruction was relevant to the issue as made by the pleadings, it was not pertinent to the case as made by the evidence, and, by the instructions given, the question to which it relates was eliminated from the case, and it was properly refused.

III. The court also refused to give the following instruction asked by defendant: "If this locomotive had frequently passed over this curve, but on this occasion it ran off the track while passing speedily over it, and this accident happened from no other cause, then you are directed that such accident was one of the risks which Conners, as a brakeman, undertook in this business of railroading, and plaintiff cannot recover therefor, and your verdict should be for defendant." The risks which Conners assumed when he entered defendant's employment were such as were incident to the business of operating the railroad when conducted in a reasonably prudent and careful manner. He did not assume the risks of such dangers as might be created by negligence or mismanagement in its operation. The instruction does not contain this latter qualification. The doctrine expressed by it is that decedent assumed the risk of the dangers incident to the speed at which the train was run. That is true if defendant was not negligent in running at that rate of speed. But the complaint was that, owing to the condition of the track, it was an act

2. RAILROADS:
death of
brakeman:
risks
assumed:
high speed.

Conners v. The Burlington, C. R. & N. Ry. Co.

of neglect to run the train over it at that speed, and there was evidence tending to establish that claim. We think the court did right in refusing the instruction.

IV. The defendant asked the court to instruct that under the law and undisputed evidence plaintiff was not entitled to recover, which the court refused to do. The court, however, gave the following instruction:

“If you find from the evidence that under the rules or regulations of the defendant’s road, of which
4. INSTRUCTIONS: taking case from jury: duty of court. decedent had knowledge, or that from the instructions to the decedent from the conductor of the train in question, or other superior officer of the railroad company authorized to give such instructions to decedent, it was made the duty of the decedent, as brakeman, when entering a station, or passing through it, to be on the top of the train to attend to the brakes, and that he knowingly disobeyed such rules and instructions, and neglected his duty by remaining in the locomotive cab, and was there injured while disobeying said rules and instructions, then plaintiff cannot recover, and your verdict should be for defendant.”

The undisputed evidence is that the deceased was in the cab when the locomotive left the track. The fireman, who was the only person in the cab at the time, who survived the accident, so testified, and the conductor, who was on top of a car at the rear end of the train, testified that he was not on top or at the brakes. Counsel for plaintiff contended that the jury might have found otherwise from the circumstance that his body was found under the wreck of a car between the point where the locomotive left the track and where it lay in the ditch after the accident. But that circumstance does not tend to contradict the positive testimony of the witnesses. The evidence is also uncontradicted that the deceased had been instructed by the conductor of the train that it was his duty when the train was approaching a station to go on top of the cars, and be ready to apply the brakes. The very state of

Conners v. The Burlington, C. R. & N. Ry. Co.

facts, then, was established, without any conflict in the evidence, which the court told the jury in the instruction would defeat all right of recovery. Under the theory adopted by the court as to the law, there was no question upon which the parties were entitled to go to the jury. Instead of submitting the case to the jury, then, for determination, it was the duty of the court to direct the verdict. It is proper, in this connection, to say that the instruction given by the court is in accord with the holding of this court in *O'Neill v. Keokuk & Des M. Ry. Co.*, 45 Iowa, 546. I am not fully satisfied of the correctness either of the holding in that case or the instruction given, but I unite in the conclusion that under that theory nothing remained for the court to do but to take the case from the jury. What is here said is not in conflict with what was said on the former appeal. We then had nothing before us but the special findings, and it did not appear from those that the deceased, by remaining in the cab, was acting in violation of any rule or instruction of the company.

V. Appellee, in an amended abstract, alleged that the evidence was not preserved by bill of exceptions.

5. APPEAL :
practice :
challenging
record after
amendment.

He, however, set out portions of the evidence, which he claimed were omitted from appellant's abstract. Having done that, the rule is that he will not be permitted

to deny that the evidence was properly preserved, or say that it is not all before us. *Starr v. City of Burlington*, 45 Iowa, 87; *Cross v. Burlington & S. W. Ry. Co.*, 51 Iowa, 683; *Wells v. Burlington, C. R. & N. Ry. Co.*, 56 Iowa, 420; *Roberts v. Leon Loan & Abstract Co.*, 63 Iowa, 76; *Wilson v. Palo Alto County*, 65 Iowa, 18.

REVERSED.

DANNER V. HOTZ *et al.*

1. **Intoxicating Liquors : NUISANCE : ABATEMENT : PARTIES ONLY BOUND.** In an action to enjoin and abate as a nuisance a place where intoxicating liquors were unlawfully manufactured and sold, the court ordered an abatement, and that the furniture, fixtures and movable property on or about the premises used in the unlawful business be removed and sold, and the proceeds applied to pay the fines and costs adjudged against defendants; also that the building should be closed for one year. The defendants had only a life estate in the realty, and those entitled to the remainder were not made parties. *Held* that the decree, so far as it ordered a sale of the fixtures, was erroneous, and that, if the life estate ended within the year, the decree as to the closing of the building would, at the same time, cease to be operative.
2. ——— : ——— : **ABATEMENT : PRIOR CESSATION.** In such case, where the defendants maintained the nuisance for, more than two years after the action was begun, but ceased the unlawful business about three weeks prior to the hearing, *held* that they were nevertheless properly enjoined, and an order of abatement was properly made. (Compare *Judge v. Kribs*, 71 Iowa, 183.)

Appeal from Johnson Circuit Court.

FILED, MAY 11, 1888.

ACTION in equity to enjoin a nuisance caused by keeping a place for the sale and manufacture of intoxicating liquors as a beverage in a building situate on certain real estate which is sufficiently described. The relief asked was granted, and the defendants appeal.

Boal & Jackson, for appellants.

L. Robinson and *Remley & Remley*, for appellee.

SEEVERS, C. J.—The court ordered the abatement of the nuisance, and that the furniture, fixtures and movable property on or about the premises, used in carrying on the unlawful business, be removed therefrom and sold, and the proceeds applied to the payment

Danner v. Hotz.

of costs, and all fines adjudged against the defendants. It was further adjudged that possession should be taken of said building, and the same be securely closed for one year as provided by law. This case is triable anew in this court, and the question is whether the judgment of the circuit court can, under the pleadings and evidence, be affirmed; and, if not, whether any decree can be rendered herein.

I. The petition and amendment thereto state that the real estate is owned by certain named persons, who are made defendants in this action, and that Barbara Hugel had or claimed an interest in the property described in the petition, and at her death such interest was inherited by Benjamin Hugel and his minor children, neither of whom was served with notice, or made parties to this action. Because of the averments of the petition, it was not demurrable for the reason that the Hugel heirs were not made parties; but the other defendants had the right to object, at the hearing, to any decree being rendered, if such heirs were necessary parties. *Forbes v. Delashmutt*, 68 Iowa, 164. As this case is triable *de novo*, such objection may be made in this court. One of the defendants, Barbara Hotz, has a life estate in one-half of the property, under the will of Simon Hotz, who owned it at his death. We are unable to discover any sufficient evidence in the record that the personal and movable property referred to in the decree came into the possession of said Barbara under or by virtue of the will, and, therefore, are unable to say that the Hugel heirs have any interest therein. As to such property, we are of the opinion that the decree can and should be affirmed. But as to fixtures attached to the real estate, we think a different rule must prevail. It satisfactorily appears from the evidence that Barbara Hotz has a life estate only in the real estate, and at her death it will become the property of the Hugel heirs and others. If such fixtures are detached and removed from the building, it may be safely assumed that the value of the real estate will be lessened, and the rights of the persons

1. INTOXICATING
liquors:
nuisance:
abatement:
parties only
bound.

Danner v. Hotz.

owning the remainder of the property permanently affected to a greater or less extent. This should not be done until the proper persons have been served with notice, and had their day in court. The duration of the life estate is uncertain. It may expire within one year, or exist for a longer period. The decree of the court closing the building is correct if the life estate continues for that length of time. If such estate should expire within one year, the decree will cease to be operative at that time, for the reason that the owners of the property upon the expiration of the life estate have not been made parties to this action, and, therefore, their rights cannot be prejudicially affected.

II. It is insisted that the evidence is insufficient to justify the decree of the circuit court, or any other decree. It fully appears that sales of beer were made on said premises, and the same kept for sale, and that a nuisance was thereby created. This action was commenced in July, 1884, and tried in October, 1886, and beer was manufactured and sold on said premises until about three weeks prior to the time last named, when the defendants ceased to do business on the premises. The fact that sales were made for two years after this action was commenced, thereby continuing the nuisance for that time, and that such sales ceased about the time this case was reached for trial, brings it within the rule established in *Judge v. Kribs*, 71 Iowa, 183.

The constitutionality of the statute is assailed, but this cannot any longer be regarded as an open question.

This cause will be remanded to the court below, with directions to enter a decree in accordance with this opinion, or, if either party so elects, a decree will be entered in this court.

MODIFIED AND AFFIRMED.

DeCamp v. Sioux City.

DECAMP V. SIOUX CITY.

74	392
83	238
74	392
d107	392
74	392
113	303
113	304

Negligence: IN CARE OF STREETS: INJURY BY FAST DRIVING: PROXIMATE CAUSE. Plaintiff was driving slowly along a street-railway track on one of the defendant's streets, and was met, struck and injured by another vehicle which was driven at a dangerous and unlawful speed along the same track. The collision would have been avoided but for the fact that the track of the street railway had been allowed to become out of repair, so that the rails were so much above the surface of the street as to prevent the parties from turning out. Conceding that the defendant was negligent in that regard in the care of its streets, and thus contributed to the injury, yet *held* that it was not liable, because the reckless driving of the person whose vehicle struck plaintiff's was the proximate cause. (Compare *Dubuque Wood & Coal Ass'n v. City of Dubuque*, 30 Iowa, 184, and *Knapp v. Sioux City & Pac. Ry. Co.*, 63 Iowa, 91.)

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, MAY 11, 1888.

THIS is an action to recover damages for a personal injury sustained by the plaintiff by reason of an alleged defect in one of the streets of Sioux City. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

A. C. Strong and J. H. & C. M. Swan, for appellant.

Pendleton & Gray and O. C. Treadway, for appellee.

ROTHROCK, J.—There is but little controversy as to the material facts in the case. The plaintiff is an expressman. He used an express wagon and one horse in carrying on his business. On the nineteenth of September, 1885, he was driving along Fourth street, in said city, his horse going in a walk. He was met in the street by a butcher's wagon, in which there were two

DeCamp v. Sioux City.

men. The wagons collided, by reason of which the plaintiff was violently thrown out upon the ground, his wagon upset, his wagon-bed fell on top of him, his horse ran away, and there was a general smash-up of his wagon. The injury to the plaintiff was not, however, occasioned by the running of his horse, but by the collision with the butcher's wagon. One of the men in the butcher's wagon, who was a witness for the plaintiff, testified that said wagon was driven, at the time of the accident, at the rate of ten to fifteen miles an hour. All of the other witnesses who testified on this point concur in the statement that said wagon was driven very fast. A witness for plaintiff, who saw the whole occurrence, stated that the team was going at the rate of fifteen miles an hour, and did not check speed until they were stopped by the collision. Another witness stated that the team was traveling "at a great rate," and "terrible fast." There was a city ordinance in force at the time of the accident prohibiting the driving of any vehicle in any street of the city faster than at the rate of six miles an hour, or driving "in such manner as to come in collision with or strike any other person or object." The plaintiff claims that the city is liable for his injuries, because it permitted the street-car tracks which were in the street to become out of repair to such an extent that the iron rails were so much above the surface of the street that, as the vehicles approached each other, the plaintiff and the driver of the butcher's wagon could not turn out so as to avoid the collision, because they could not pull the wheels of the wagons over the rails, although they endeavored to do so; that the wheels of the wagons slid along the rails, and thus caused the collision. The defendant requested the court to give to the jury the following, among other instructions:

"If the jury find from the evidence that the accident by which the plaintiff was injured was caused by the negligence of the city in not keeping its street in repair, combined with the acts of a third party for which the city was not responsible, and would not have hap-

DeCamp v. Sioux City.

pened but for the acts of such third party, then the city is not liable."

"If the jury find from the evidence that, although the defendant was negligent in keeping its streets in repair at the time and place where the accident occurred, the accident would not have happened to the plaintiff by reason thereof without the driving of the team of Ibs upon the street-railway track in the manner in which it was driven, and that the driver of said team and wagon of said Ibs, in driving upon said railway track at the time and in the manner and at the rate of speed he did, was not using ordinary care, then the defendant is not liable."

These instructions were refused, and the court, on its own motion, charged the jury, as to this feature of the case, as follows:

"The jury are instructed that, in general, the negligence of third parties, concurring with that of the defendant to produce an injury, is no defense; but if the jury find from the evidence that the accident in question was caused or occasioned by the negligence or carelessness of the driver of the team that collided with plaintiff's team, without any fault or negligence on the part of defendant concurring therein, then the plaintiff cannot recover; but if you find that the defendant was negligent, under this charge, in permitting the defect in the street at the time of the accident, and at the place as alleged, and that such negligence and defect contributed to produce and occasion the injury in question, then the fact that the driver of the wagon colliding with plaintiff's team was negligent would not defeat plaintiff's right to recover."

The defendant insists that these rulings of the court are erroneous, and we think his position must be sustained. As we have said, there is no question but that the butcher's wagon was driven in a careless and negligent manner. Not only this, its rate of speed was reckless, dangerous, unlawful and criminal. Under the ordinances of the city its driver was liable to a fine of one hundred dollars, or imprisonment for thirty days.

Homire v. Rodgers.

The effect of the collision was perhaps stronger evidence of the reckless conduct of the driver than the testimony of the witnesses. No such a general smash-up would have occurred if the butcher's wagon had been driven as it ought to have been. Under the undisputed facts of the case, conceding that the street was out of repair, the plaintiff, to say the least, received his injuries by reason of the combined negligent acts of the city and the driver of the butcher's wagon. More than this, the reckless driving was the immediate and proximate cause of the injury. There is no warrant in the evidence for a finding that, if the team had been driven at a lawful and proper rate of speed, the collision would have nevertheless injured the plaintiff. This being so, the condition of the street was not the direct and proximate cause of the injury. Whatever the rule may be in other states, we think that the law in this state is settled that, under such circumstances, there can be no recovery against the city. See *Dubuque Wood & Coal Ass'n v. City of Dubuque*, 30 Iowa, 184, and *Knapp v. Sioux City & Pac. Ry. Co.*, 65 Iowa, 91.

REVERSED.

HOMIRE V. RODGERS.

1. **Pleading : AVERMENT BY NECESSARY INFERENCE.** A material fact may be pleaded either by express averment, or by the averment of other facts from which the material fact is a necessary inference. (See opinion for examples.)
2. **Payment : TO STRANGER : RATIFICATION BY ACTION FOR MONEY.** Where certain persons owed plaintiff, but by the false representations of defendant they were induced to pay the money to him, *held* that plaintiff could maintain an action against him for the money, because, by the very act of bringing the suit, he ratified the payment to defendant, and elected to look to him alone for the amount.

74	395
94	294
74	395
109	424
74	395
128	744

Homire v. Rodgers.

8. **Burden of Proof: UNNECESSARY AVERMENT IN ANSWER.** Plaintiff's intestate took cattle to pasture for the season, and turned them into a pasture leased of defendant. Defendant, claiming that he had a lien on the cattle for the rent of the pasture, collected from the owners the full amount due from them for the pasturage. Plaintiff brought this action to recover the alleged excess of the money thus collected above the rent of the pasture. Defendant in his answer pleaded affirmatively that the money collected was no more than the agreed rent. *Held* that this allegation was unnecessary, and that it was error to instruct that defendant had the burden of proof to establish it.

Appeal from Adair District Court.—HON. J. H. HENDERSON, Judge.

FILED, MAY 11, 1888.

ACTION to recover an amount of money collected, as is alleged by defendant, for plaintiff's intestate. There was a verdict and judgment for plaintiff. Defendant appeals.

Gow & Hager, for appellant.

D. W. Church, for appellee.

REED, J.—It is alleged in the petition that plaintiff's intestate received into his possession in May, 1882, about two hundred and sixty head of cattle belonging to other parties, which he undertook to herd during the season for the price of forty cents each per month; that he afterwards, on the ninth of July, contracted with defendant for pasturage for said cattle, and, in pursuance of such contract, turned them into defendant's inclosed pasture, where they remained until the end of the season; that, when the owners applied to defendant for their cattle, he represented to them that, under his contract with the intestate, he was to receive two dollars per head for the pasturage of the cattle for the time they were in his pasture, and asserted a lien on the cattle for that amount; and that the owners, relying on that statement, paid to him the amount demanded, which was the sum due to the intestate from the owners

Homire v. Rodgers.

for herding and caring for the cattle during the whole season; and that the amount so demanded and collected by defendant was in excess of the amount due him under his contract with the intestate; and the prayer is for judgment for the amount of such excess. On the trial the only contested question of fact was whether, under the contract between the intestate and defendant, the latter was to be paid two dollars per head for the pasturage of the cattle for the time they were in his inclosure, or at the rate of two dollars per head for the season, which would be forty cents a month.

I. Defendant moved in arrest of judgment, the grounds of the motion being that no cause of action is stated in the petition, in this, that it is not alleged either that the statement made by defendant to the owners of the cattle as to the amount that was due him under the contract was false, or that anything was due to the intestate from the owners, under their agreement, when the payments were made to defendant. We are of the opinion that the motion was properly overruled. The amount of money received by defendant, as shown by the petition, was four hundred and eight dollars, and it is alleged that the amount due him under the contract was but \$277.56. Now, while it is not expressly averred that his statement as to the amount which was due him was false, the falsity of the statement is shown by these averments as to the amount claimed and the amount actually due. The falsity of a statement or representation may be pleaded either by an express averment, or by a statement of facts showing that it is false. It is not expressly averred that anything remained due the intestate from the owners of the cattle when they made the payments to defendant; but it is averred that they agreed to pay him forty cents per month for the pasturage of each animal, and that the cattle were pastured during the season under that contract, and that the money was paid over to defendant in pursuance of the contract. In effect, that is an averment that the

1. PLEADING:
averment by
necessary
inference.

Homire v. Rodgers.

amount paid to defendant was due to the intestate under the contract.

II. Defendant asked the court to instruct the jury, in effect, that plaintiff would not be entitled to recover, even if the amount collected by defendant from the owners of the cattle exceeded the sum he was entitled to receive under his contract with the intestate. The court, however, refused to give such instruction, but told the jury that, if defendant collected the money from the owners of the cattle on the representation charged, and the amount received by him was in excess of the amount which was due him under his contract with the intestate, he was liable to plaintiff for the amount of such excess. The position urged by counsel for appellant is that the representation as to the amount due is, if false, a wrong which affected only the owners of the cattle; and the liability therefor is to them, and not to plaintiff. If the liability of the owners of the cattle to the intestate was not discharged by their payment of the money to defendant, and the matters occurring subsequently to such payments, it would be true, doubtless, that whatever right of action arose out of the payment accrued in favor of the parties making it; and it may also be conceded that they could not discharge their liability to the intestate by paying the amount they were owing him to another without his consent. But it is to be borne in mind that the payments were made, not in discharge of any indebtedness of the parties to defendant,—for they owed him nothing,—but because of their liability to the intestate; that is, defendant, by receiving the money from the parties, assumed to collect the amount of their indebtedness to the intestate, and apply the money so received in satisfaction of the indebtedness of the intestate to him. Now, if the collection had been made by the direction or with the consent of the intestate, there would be no doubt but that the obligation of the parties to him would have been discharged by the payment, and it would be equally clear that defendant would be bound to account to him for the money; and the same result

PAYMENT:
to stranger:
ratification
by action for
money.

Homire v. Rodgers.

would follow if there was a subsequent ratification of the act by the intestate. But he did ratify it by bringing this action against defendant for the recovery of the money ; for by that act he elected to look to him alone for the amount. He thereby recognized the payment as having been made in discharge of the liability of the owners of the cattle to him ; and their obligations arising under the contract must now be regarded as fully satisfied.

III. The district court instructed that "if defendant collected the money, claiming that the amount collected was simply the amount that was due him for the pasturage, the burden was on him to establish that he was entitled to all the money so collected." We think this instruction is erroneous. It puts upon defendant the burden of proving the truth of the representation upon which the money was paid to him. Whether that representation is true or false, depends upon whether the contract between defendant and the intestate was as claimed by defendant or as claimed by plaintiff. Plaintiff alleged that, under the agreement between defendant and the intestate, the former was to receive but forty cents per month for the pasturage ; but defendant claimed that he was to receive two dollars per head for the balance of the season, and he collected that amount from the owners of the cattle, and represented to them, when he made the collection, that that amount was due him. Now, the burden was on plaintiff to prove his averment, and its establishment would necessarily prove the falsity of defendant's claim. But, if the burden was on defendant to establish the truth of his claim, as the instruction holds, it follows that plaintiff was relieved of the burden of proving his allegation. The defendant pleaded affirmatively that, under the contract, he was to receive two dollars per head for pasturing the cattle ; but he was not required to do that. The whole question as to what compensation he was to receive would have arisen under a general denial of plaintiff's averment. The affirmative allegation in the answer did

8. BURDEN of
proof : un-
necessary
averment in
answer.

Howes v. Axtell.

no more than raise that question; and the fact that the matter was pleaded in that form does not change the rule as to the burden of proof. For this error the judgment must be

REVERSED.

HOWES V. AXTELL.

1. **Verdict: EVIDENCE TO SUPPORT ON APPEAL.** This court will not interfere with a verdict for want of evidence to support it, where there is no such absence of evidence as to warrant the conclusion that the verdict was not the result of an honest and intelligent exercise of the discretion of the jury.
2. **Damages: MEASURE OF: DEFICIENCY OF LAND SOLD.** Where defendant sold land to plaintiff for thirty dollars per acre, or a gross sum of twenty-five hundred and twenty dollars, falsely representing that the tract contained eighty-four acres, but it in fact contained only seventy-five and seventy-nine one-hundredths acres, and plaintiff brought suit for damages, alleging the above facts, *held* that the measure of his damages was the difference between the value of the tract as it was represented to be, and its value as it really was; and that the value as represented was fixed by the law at twenty-five hundred and twenty dollars, because the parties had agreed upon that sum. Also that instructions to that effect were appropriate to the issues.

Appeal from Clayton Circuit Court.

FILED, MAY 11, 1888.

ACTION to recover for false and fraudulent representations by defendant as to the quantity of land contained in a tract sold and conveyed to plaintiff. Verdict and judgment for plaintiff. Defendant appeals.

B. W. Newberry and James O. Crosby, for appellant

A. R. Cole and Murdock & Davidson, for appellee.

74	400
111	446

74	400
118	75

74	400
134	391

74	400
140	414

BECK, J.—I. The petition alleges that plaintiff purchased of defendant a tract of land, paying therefor twenty-five hundred and twenty dollars; that defendant falsely and fraudulently represented to plaintiff that the tract contained eighty-four acres of land, and that plaintiff relied upon such statement, and was induced thereby to purchase and pay for the land. It is further alleged that it contained no more than seventy-five and seventy-nine one-hundredths acres; that it would have been reasonably worth the sum paid by plaintiff, had it contained eighty-four acres, but that the land was worth no more than twenty-two hundred and sixty dollars. Plaintiff claims to recover two hundred and sixty-five dollars damages. Defendant admits the allegations of the petition as to the contract for and sale of the land, but denies all other allegations.

II. It is first insisted that the verdict as to the facts in issue lacks the support of the evidence. All that need be said on this point is that the evidence on the issue of fact is conflicting. It cannot be said that upon any question of fact there was such an absence of proof as to authorize us to interfere under the familiar rules prevailing in this court applicable to this point. It cannot be fairly claimed that upon any question of fact in issue there was such an absence of evidence as to warrant the conclusion that the verdict was not the result of an honest and intelligent exercise of the discretion of the jury.

III. The circuit court gave instructions to the jury in the following language, which are complained of by defendant's counsel.

“11. If you find that there was fraud in the sale of the land, that is, that the plaintiff is entitled to recover, the next question for you will be, how much is the damage? And for that purpose the rule of law is this: To ascertain the difference in the value of the land as it was represented to be, and its value as it really was, and that difference is the plaintiff's damage.”

1. VERDICT:
evidence to
support on
appeal.

2. DAMAGES:
measure of:
deficiency of
land sold.

Howes v. Axtell.

“12. As to the value of the eighty-four acres, if the land was sold for that amount, the law fixes the value, and that is the price agreed upon by the parties, namely, twenty-five hundred and twenty dollars; and the question for you will be how much less was it worth on account of the deficiency as shown by the testimony; that is, how much less was the farm worth on account of such deficiency? And when you have agreed upon that it will be the amount of your verdict for the plaintiff.”

Counsel concede that if the eleventh instruction were applicable to the issues raised in the case it would be correct, being unobjectionable as an abstract proposition of law. But they insist that it does not accord with the petition. We think differently. The petition, as will have been observed by attention to our statement of its allegations, shows the price agreed to be paid for the land, which was thirty dollars per acre; that it was represented to contain eighty-four acres. The instruction directs that plaintiff's measure of damages is the difference of the value of the land as it was represented and the real value according to its true number of acres. The twelfth instruction directs the jury that the price agreed upon is to be taken as the value of the eighty-four acres of land. This is correct. When parties, by solemn agreement, fix a value to property, they are bound by it. The law will not, in a case of this kind, permit either party to dispute the value as settled by them. The instruction directs that the value of the land as it is found, considering its real quantity, is to be deducted from the value as settled by the agreement of the parties, and the difference will be plaintiff's damages. This rule is just, as it gives plaintiff compensation, and nothing more. See *Hallam v. Todhunter*, 24 Iowa, 166. The instructions, we think, are correct, and are applicable to the case made by the petition and to the evidence. These considerations dispose of all questions in the case.

It is our opinion that the judgment of the circuit court ought to be

AFFIRMED.

CONLEE LUMBER COMPANY V. MEYER.

1. **Assignment for Benefit of Creditors : TIME OF FILING CLAIMS : SENDING BY MAIL.** It is the duty of a person having a claim against one who has made an assignment to present his claim to the assignee within the time required by statute ; and if he intrusts it to the mails, he does so at his own risk ; and if it reaches the post-office of the assignee on the evening of the last day, but is not received by him until the next morning, it is too late, and he cannot claim relief on the ground of the negligence of the assignee in failing to take it from the office.
2. ——— : ——— : **LIMIT : DUTY OF ASSIGNEE.** A creditor who fails to file his claim with the assignee within three months after the first publication of the notice of assignment is not entitled to share *pro rata* in the dividends of the estate. (*Assignment of Holt*, 45 Iowa, 301, *followed*.) And it is the duty of the assignee to resist an attempt to have such claim paid as if filed in time, even though no creditor files exceptions to it.
3. ——— : **PROSECUTION OF BELATED CLAIM : EVIDENCE OF PUBLICATION OF NOTICE OF ASSIGNMENT.** In the prosecution against an assignee of a claim which was resisted, because filed more than three months after the first publication of the notice of assignment, it appeared that the assignee had made and filed a report, as required by Code, section 2120, and the report showed that the notice had been duly published. *Held* that this was *prima-facie* evidence of that fact, and that the court would take judicial notice of it, without a formal tender of the report in evidence.
4. ——— : **BELATED CLAIM : EQUITABLE RELIEF.** Under section 2126 of the Code, equitable relief cannot be granted to a creditor who fails to file his claim with the assignee within three months after the first publication of the notice of assignment. (*McKindley v. Nourse*, 67 Iowa, 121, *followed*.)

Appeal from Scott Circuit Court.—HON. NATHANIEL FRENCH, Judge.

FILED, MAY 11, 1888.

GEORGE OTT made an assignment for the benefit of his creditors on the twenty-seventh day of April, 1886, and on the same day his assignee qualified and gave

74	403
78	484
74	408
82	39
74	403
94	446
74	403
144	301

 Conlee Lumber Co. v. Meyer.

notice of the assignment. The Conlee Lumber Company was a creditor of Ott, but failed to place its claim in the hands of the assignee until July 28, 1886. It instituted this proceeding to obtain an order directing the assignee to treat its claim as though presented within the time required by law, and to make payment of dividends accordingly. The circuit court refused to grant the relief asked, and the company appeals.

W. C. Putnam, for appellant.

Bills & Block, for appellee.

ROBINSON, J.—I. It is first claimed by appellant that its proof of claim was received in Davenport,

where the assignee resided, on the twenty-seventh day of July, 1886, and that, but for the neglect of the assignee, it would have been received by him on that date.

This claim is based upon the fact that the proof was mailed at Oshkosh, Wis., on the twenty-sixth of that month, and, in the ordinary course of the mails, should have been received at the post-office in Davenport at seven o'clock in the evening of the next day, or a little later. The assignee did not call for his mail that evening, nor arrange for its delivery. Whether the proof was received at the Davenport office that evening is not shown, but it was received by the assignee at half-past seven o'clock of the next morning. The alleged negligence of the assignee consists in his failure to get his mail during the evening of the twenty-seventh. No doubt it was his duty to give to all creditors sufficient opportunity to present proof of their claims within the time allowed by statute. We think that duty was discharged if he was at his usual place of business during business hours, and received all proofs of claims presented to him during the time aforesaid. If a creditor desires payment of his claim he should present it, not to a postmaster or express agent, but to the assignee. If, instead of delivering the proof in person, he employs an agency for its transmittal, he does so at his own risk, and the failure of the agent to present the

1. ASSIGNMENT
for benefit of
creditors :
time of filing
claims : send-
ing by mail.

Conlee Lumber Co. v. Meyer.

proof within the required time is his failure. *Ellison v. Lindsley*, 33 N. J. Eq. 258. We therefore conclude that the claim of negligence on the part of the assignee is not well founded.

II. It is next urged by appellant that the proof of its claim was in fact actually presented to the assignee in ample time to entitle it to share in the dividends of the estate under the provisions of law. Counsel for appellant make a very able and exhaustive argument in support of this position. It is not necessary, however, to consider the question raised at length. It was decided adversely to the position of appellant in *Assignment of Holt*, 45 Iowa, 301, and we are not disposed at this time to question the correctness of that decision.

III. It is claimed that, since no creditor has filed any exceptions to the claim of appellant, and since none was filed by the appellee, no objection can now be made by the appellee to its allowance. We understand that the assignee, in making the report required by section 2120 of the Code, showed that the proof of appellant was filed after the expiration of three months from the time of first publishing his notice of the assignment. That was all he was required to do, so long as the justness of the claim itself was not questioned. It is the duty of the assignee to see that the estate intrusted to him is settled in accordance with law. He is required to pay in full all claims exhibited to him within three months from the first publication of the notice of assignment before he can pay anything on those exhibited after that time. It is, therefore, not only his privilege, but his duty, to resist a payment not authorized but forbidden by law.

IV. It is said, on the part of appellant, that there is no proof that notice of the assignment was published for the time and in the manner required by statute. The proceeding of appellant is not founded on any claim that the notice was not so published, nor does appellant deny that the publication was sufficient.

2. — : — :
limit : duty
of assignee.

THE SAME.

3. — : prose-
cution of
belated claim:
evidence of
publication of
notice of
assignment.

Conlee Lumber Co. v. Meyer.

In the absence of proof, we would be justified in presuming from the statements of appellant's motion that the publication was all that the law required. But the abstract shows that the assignee made report and proof of service of notice as required by section 2120 of the Code. That report shows that the notice was published as required by law. We do not understand that this is denied by appellant, but it is claimed that the report was not proven. When it was properly filed it became a part of the record in the assignment of Ott, and *prima-facie* evidence of the facts therein recited. It was not necessary under the facts of this case to make a formal tender of it in evidence. It was the duty of the circuit court to take judicial notice of its contents so far as relevant to the issues raised by the proceeding of appellant.

V. It is further claimed by appellant that it did not receive actual notice to present its claim to the assignee until the twenty-fifth day of July, 1886, and that the time then remaining in which to present the same was unreasonably short.

4. —: belated
claim: equi-
table relief.

It therefore insists that it is entitled in equity to the relief it asks. We doubt whether appellant has shown itself entitled to equitable relief. Two days remained after it received the notice in which to present its claim, even if all that is claimed for it be true. By the use of reasonable diligence the claim could have been presented to the assignee within that time. But however this may be, the right of appellant to the equitable relief asked is hardly an open question. We decided in *McKindley v. Nourse*, 67 Iowa, 121, that section 2126 of the Code is a positive bar to the granting of such relief.

AFFIRMED.

The State v. Birmingham.

THE STATE V. BIRMINGHAM *et al.*

1. **Highway : BY DEDICATION OR PRESCRIPTION : EVIDENCE OF USE BY PUBLIC.** Where the question was as to the existence of a public highway, which, if it was a legal highway at all, became such either by dedication or prescription, and there was evidence tending to show a dedication, *held* that evidence of use by the public was competent for the purpose of showing an acceptance of the dedication, though not competent, under section 2031 of the Code, to show title in the public by prescription.
2. ——— : **PROSECUTION FOR OBSTRUCTING : PAROL TESTIMONY AS TO TITLE TO LAND.** In a prosecution for obstructing an alleged highway, which defendants claimed was not a legal highway, *held* that it was error to permit the state, in its attempt to prove that the highway existed by dedication or prescription, to introduce parol testimony as to the title to the land over which it ran, no foundation having been laid for such secondary evidence.
3. ——— : **BY DEDICATION : EVIDENCE : LAPSE OF TIME.** Lapse of time is not necessary to the establishment of a highway by dedication. All that is necessary is a dedication by the owner and an acceptance by the public ; and the dedication may be by writing, by declaration, or by conduct. And if the owner of the land in question knows for a series of years that the public is using and treating the road as a highway, and expending funds in its improvement, and he acquiesces in what is thus being done, such facts may well be considered as evidence tending to prove actual dedication. (See cases cited in opinion.)
4. **Instructions : READING INDICTMENT NOT COPIED IN CHARGE.** In instructing the jury the court read the indictment as a part of the first paragraph of the charge. There was no statement of the issues in this paragraph, but a blank appeared therein after the following sentence : "The defendants are before you on the following indictment." After the blank appeared the following : "To which indictment the defendants have entered a plea of not guilty." *Held* error, as the instructions must be wholly in writing signed by the judge. (See Code, sec. 4440 ; *State v. Brainard*, 25 Iowa, 578 ; *Hall v. Carter*, ante, p. 364.)

Appeal from Boone District Court.—HON. S. M.
WEAVER, Judge.

FILED, MAY 11, 1883.

74	407
81	282
81	375

74	407
88	541

74	407
92	553

74	407
98	505

74	407
104	62
104	112

74	407
109	483

74	407
117	307

74	407
1132	713

74	407
134	664

DEFENDANTS were indicted for the crime of nuisance alleged to have been committed by unlawfully obstructing a public highway. They were found guilty and adjudged to pay the costs of suit and to remove the alleged obstruction within thirty days. Defendants appeal.

Crooks & Jordan, for appellants.

No appearance for appellee.

ROBINSON, J.—The defendants are charged with having obstructed a highway by permitting to be placed thereon slack from a coal mine which they were operating. The alleged highway had been worked by road supervisors, and traveled by the public, for many years. It ran through unenclosed timber land. It was not shown to have been established under the provisions of law relating to highways, and if it was a legal highway at the time in question it must have become such by dedication of the owner of the land over which it passed, or by prescription. Appellants claim that it was not shown to be a legal highway at the time the alleged obstruction was placed in it.

I. Appellants complain of the ruling of the court in allowing to be introduced evidence that the road in question had been used by the public as a highway, and cite section 2031 of the Code, and *State v. Mitchell*, 58 Iowa, 567, and *Zigefoose v. Zigefoose*, 69 Iowa, 391, in support of their position. The section referred to is as follows: “In all suits hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession of the same for the period of ten years, or by prescription, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be proved by evidence distinct from and independent of the use, and that the party against whom the claim is made had express notice thereof, and these

1. HIGHWAY: by
dedication or
prescription:
evidence of
use by public.

The State v. Birmingham.

provisions shall apply to public as well as private claims." The effect of this section is to require proof that the use of the real estate by the party claiming the easement was adverse and under a claim of right, and it provides that the use itself is not competent evidence of such facts. Neither of the cases cited is in conflict with this view. On the contrary, that of *State v. Mitchell* sustains it. Use of the realty by the party claiming the easement may be shown for some purposes. Where a dedication of an easement is claimed to have been made by the land-owner, proof of use may be competent to show an acceptance by the party for whose benefit the dedication was made. *Com. v. Coupe*, 128 Mass. 65. Some of the evidence offered on the part of the state seemed designed to show a dedication. We therefore conclude that the objections of defendants were not well founded.

II. In order to prove title to the land over which the road in question ran, several witnesses for the state were permitted to state who had formerly owned such land, and to whom and when he sold it. None of these witnesses were shown to have had any interest in the title. Two of them said their knowledge was from hearsay, and the third said that his was from the records. This evidence was duly objected to by defendants, on the ground that it was incompetent, immaterial and not the best evidence. We think the objections should have been sustained. As a general rule the title to real estate cannot be proven by parol. *Davis v. Strohm*, 17 Iowa, 427. We do not think this case is an exception to that rule. The question of the legal character of the road in controversy was a vital one to defendants, and was not merely collateral or incidental. Unless the public had used the road under a claim of right for the requisite length of time, with the knowledge of the owner that such use was adverse, or unless the owner had dedicated the land over which it passed to the public, the defendants could not have been guilty of the crime alleged.

2. — : prosecution for obstructing parol testimony as to title to land.

The State v. Birmingham.

No reason was shown for not producing competent evidence as to the ownership of the land, and, in the absence of proof to the contrary, we must presume that it existed.

III. The district court instructed the jury as follows:

“If you find that for a series of years the way in question has been traveled and used by the public as a highway, and that it has been recognized by the proper authorities as a highway by the making of repairs and expenditure of the public road funds thereon, and that during such time the owner or owners of the land have resided in the immediate vicinity, having actual knowledge of the fact of such public use and such recognition by the public authorities, and have acquiesced therein without protest or objection, such acts and conduct on the part of the land-owners are competent evidence tending to show a dedication of the highway to the public use, and should be considered by you, with all the other facts and circumstances in evidence, in determining whether such dedication ever was or was not made. If you find that any such dedication was made by a former owner of the land, and accepted by the public, such dedication and acceptance would be binding on all subsequent purchasers.”

Appellants' only contention is that this instruction was erroneous in that the time it mentioned is “a series of years” instead of a period of not less than ten years. Another portion of the charge instructed the jury that “to constitute a highway by prescription the road must have been occupied and used by the public, under a claim of right to the same as a highway, with the knowledge of the owner of the land, for a period of more than ten years.” We do not think the instruction is open to the objection made. Lapse of time is not essential to the establishment of a highway by dedication. In that case it is only necessary to show the dedication by the owner and the acceptance by the public, and the dedication may be shown by writing, by declaration, or by

The State v. Birmingham.

conduct. *Com. v. Coupe*, 128 Mass. 65; Washb. Easem. 209, 217, 219; *Fisher v. Beard*, 32 Iowa, 352; *Morrison v. Marquardt*, 24 Iowa, 53; *Mosier v. Vincent*, 34 Iowa, 479. It is claimed that *Manderschid v. City of Dubuque*, 29 Iowa, 79, and *Onstott v. Murray*, 22 Iowa, 457, announce the doctrine that a lapse of ten years is required to raise a presumption of dedication from use by the public. It is true those cases hold that such a presumption will arise from continued and uninterrupted use by the public for that length of time, but they do not hold that an actual dedication may not be shown without regard to lapse of time by proving such facts, and such conduct on the part of the land-owner, as would amount to a legal dedication, or would estop him from denying that it had been made. We are of the opinion that if the owner of the land in question knew for a series of years that the public were using and treating the road as a highway, and expending funds in its improvement, and that he acquiesced in what they were doing, such facts might well be considered evidence tending to prove actual dedication. Washb. Easem. 212-219.

IV. The court in instructing the jury read the indictment as a part of the first paragraph of its charge.

There is no statement of the issues in this paragraph, but a blank appears therein after the following sentence: "The defendants are on trial before you upon the following indictment." After the blank appears the following: "To which indictment the defendants have entered a plea of not guilty." We held in *Hall v. Carter*, ante, p. 364, that a similar method of charging the jury was erroneous. What we said in that case as to the requirements of the charge is applicable to this. Code, sec. 4440; *State v. Brainard*, 25 Iowa, 578. Whether this error was cured by other portions of the charge we need not determine, since the judgment of the district court will have to be reversed on other grounds.

V. Appellants complain of the seventh paragraph of the charge. We are of the opinion that the language therein used is somewhat objectionable, but, under the

4. INSTRUCTIONS:
reading
indictment
not copied in
charge.

In re Van Brocklin's Estate.

facts disclosed by the record, do not think any prejudice resulted from it.

Other questions discussed by counsel are of such a nature as not to require us to determine them at this time. For the errors in the admission of evidence which we have indicated, the case is

REVERSED.

In re VAN BROCKLIN'S ESTATE.

Will: POWERS CONFERRED ON EXECUTORS: PERSONAL TRUST. A resident of the state of Illinois made a will and named G. and V., residents of that state, as his executors, and after his death they qualified as such in that state. In a codicil he devised certain lands in Iowa to "my executors in said will named, in trust for the following purposes: It is my will, and I hereby give said executors power to sell and convey said land * * * whenever they shall think it advisable to do so." The trust was for the benefit of the widow and children of a deceased son. G. and V. did not sell the land, and the appellant caused the will to be filed in the county in which the land lies, and served notice on the executors to qualify in Iowa and execute the will. This they failed to do, and he was appointed administrator in Iowa, and as such filed a petition to sell the land and distribute the proceeds as provided in the will, on the ground that the interest of the beneficiaries, and the will itself, required that this should be done. *Held* that the petition was properly denied, because the power to sell was given, not to executors in general, but only to G. and V., in whom the testator reposed special trust and confidence, and who had not renounced the trust, nor refused to execute it when in their judgment it would be advisable to do so. (*Lees v. Wetmore*, 58 Iowa, 170, distinguished; and *Hodgin v. Toler*, 70 Iowa, 21, followed in principle.)

Appeal from Benton District Court.—HON. L. G. KINNE, Judge.

FILED, MAY 12, 1888.

THE facts are stated in the opinion.

Mullan & Hoff, for appellant.

Gilchrist & Haines, for appellee.

In re Van Brocklin's Estate.

SEEVERS, C. J.—I. Conrad Van Brocklin was a resident of Illinois, and, prior to his death, executed a will, which was duly admitted to probate in that state in 1877. Among other bequests, he devised certain real estate in the state of Missouri to his son William A. Van Brocklin and appointed Abraham T. Green and Henry O. Van Brocklin executors. The will was executed in 1871; and in 1874, he executed a codicil, which recites the fact that William A. Van Brocklin is dead, and the testator devised said real estate to the widow and children of his son. In 1877, he executed a second codicil, which recites the fact that the testator had sold or exchanged the lands in Missouri for certain described lands in Benton county, Iowa. The material portion of this codicil is in these words: "It is, therefore, my will, and I hereby give and devise the said land in the county of Benton and state of Iowa, above described, to my executors in said will named, in trust for the following purposes: It is my will, and I hereby give said executors power to sell and convey said land, and to make, execute and deliver, as such executors, to the purchaser or purchasers thereof, good and sufficient deeds of conveyance of the same whenever they shall think it advisable to do so; said sale to be made either at public or private sale, as my said executors shall deem best; and, in case such sale is made by my said executors, to divide the proceeds thereof in the same manner that I had in said codicil provided for the disposition of the proceeds of the sale of said land in the state of Missouri, in the foregoing codicil mentioned: provided, however, that, if my said executors have not made sale of said land before the youngest child of my said son William A. shall have arrived at the age of majority, then and in that case it is my will that said land shall not be sold by my said executors." The persons named in the will qualified as executors in Illinois. The applicant to sell the real estate caused the will to be filed in Benton county, and served a notice on the executors to qualify in this state, and execute

In re Van Brocklin's Estate.

the will. This they failed to do, and the applicant was appointed administrator of the estate of Conrad Van Brocklin, and he duly qualified, and filed a petition asking the court to sell the land, and distribute the proceeds, as provided in the will, on the ground, substantially, that the interest of the beneficiaries required that this should be done, and that the will so authorized and directed. The widow and children of William A. Van Brocklin were notified of such proceedings, and the former and one of the latter appeared, and demurred to the petition. The demurrer was sustained, and the applicant appeals.

II. The material question is to ascertain the interest of the testator, and the power conferred upon, and title, if any, in and to the real estate, which is vested in the persons named as executors. The testator devised the land to "my executors in said will named, in trust." This, we think, is equivalent to a devise to Abraham Green and Henry O. Van Brocklin, whom the testator had named as executors. The will or codicil also provides that power is given to "said executors" to sell and convey said land; that is, the power is given the persons named as executors. If the testator had intended otherwise, it may well be presumed that he would have said "my executors." The power conferred on such persons was to sell the land "whenever they shall think it advisable to do so." The testator therefore reposed in the persons so named as executors a special "trust and confidence." His intention, it seems to us, clearly expressed, is that they should act for him, in his place and stead, and that he vested in them the power to do so. The provisions of this will are different from those in *Lees v. Wetmore*, 58 Iowa, 170. In that case the executors were directed to sell, and the only discretion vested in them was as to when the sale should be made. In the present case a simple power to sell when they deemed advisable is given. But the material difference is that in the cited case the power was conferred on the executors, and not on the persons named as such. Nor is this case precisely like

Thompson v. Maxwell.

Hodgin v. Toler, 70 Iowa, 21 ; but the only material difference is that in that case the power to sell, conferred on the persons named as executors, was conferred upon them jointly, or upon the survivors. We, however, think the intent of the testator just as clearly appears in this case as in that. An administrator in this state has no control over real estate, or the power to sell the same, except as it becomes necessary to do so in order to pay debts. It is true, the persons named as executors have not sold the lands ; but, as they have not renounced the trust, it must be presumed that the proper time, in their judgment, has not arrived. It cannot be fairly said that they have refused to execute the trust ; and, until they do so, why should the clear intent of the testator be set aside and ignored ? *Tainter v. Clark*, 13 Metc. 220-227. We are of the opinion that the demurrer was correctly sustained.

AFFIRMED.

THOMPSON V. MAXWELL.

1. **Appeal: EVIDENCE TO SUPPORT VERDICT.** Where there is a fair conflict in the evidence this court will not disturb the verdict based thereon.
2. **Settlement: CONTRADICTION OF RECEIPTS BY PAROL.** Since receipts showing a settlement are but *prima-facie* evidence of that fact, and may be contradicted by parol, *held* that where there was such a contradiction, and a finding by the jury that there was no settlement, this court could not interfere with such finding as being unwarranted.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, MAY 12, 1888.

74 415
131 526

 Thompson v. Maxwell.

ACTION on an account for work and labor performed. Answer: (1) in denial; (2) pleading payment; and (3) that there had been a settlement of the account, and the balance due thereon ascertained, and that the same was paid. Verdict and judgment for plaintiff, and defendant appeals.

Baylies & Baylies, for appellant.

Guthrie & Maley, for appellee.

REED, J.—I. It was contended that the finding of the jury that any amount was due plaintiff is contrary to the evidence; but there was a fair conflict in the evidence, and, under the settled rule, we cannot interfere with the verdict on that ground.

1. **APPEAL:** evidence to support verdict.

II. The court gave the following instruction:

“The burden is upon defendant to prove his allegation of settlement and payment by a preponderance of evidence. If there was a reckoning of accounts between them, and a result arrived at, to which both agreed, that would be a full and completed settlement, and binding upon both parties. If there was a settlement, the presumption is that it included all matters of account to the date of such settlement, unless it is alleged and proven that, by agreement, fraud or mistake, certain items or accounts were omitted. The plaintiff does not so allege or prove, but denies that there was a settlement, and asks to recover upon account. If you find there was a settlement, you will presume it was of all items of account between them to its date; and the plaintiff in such case cannot recover therefor. Receipts reciting a settlement are not conclusive evidence thereof, but are open to be explained or even contradicted by the party against whom they run.”

It was contended that the verdict is against that instruction. Defendant testified that there was a settlement of all matters of account between the parties; and

The Aultman & Taylor Co. v. Trainer.

he introduced a receipt, signed by plaintiff, which recites that it includes all accounts against defendant. The receipt was attached to a bill of articles which plaintiff had presented to defendant, but which, owing to a change in their relations, she had requested him to return to her. He, however, preferred to retain them, and pay her their value. She testified that, while she attempted to effect a settlement with him of the account sued on, they never in fact did settle it, and that she did not know, when she signed the receipt, which defendant wrote, that it contained the statement as to the settlement. The receipt was *prima-facie* evidence of a settlement; but, as it was subject to explanation or contradiction, the jury may well have found, under the evidence, that no settlement was ever in fact made. The verdict may be wrong; but it is not without the support of evidence, and we cannot disturb it. The judgment will be

AFFIRMED.

THE AULTMAN & TAYLOR COMPANY V. TRAINER.

Sale of Machine : ACTION ON PURCHASE NOTE : WARRANTY : FAILURE OF CONSIDERATION : EVIDENCE. In an action upon a promissory note given for the purchase price of a machine, where the defense was failure of consideration and breach of written warranty, defendant was permitted, without objection, to testify to the contents of the alleged written warranty, without laying a foundation for the introduction of such secondary evidence, and plaintiff did not afterwards move to exclude this testimony. *Held* that it could not afterwards object to the testimony of the defendant and others as to the worthlessness of the machine on the ground that no warranty had been proved; and that, at all events, such testimony was admissible on the issue of failure of consideration.

Appeal from Ida District Court. — HON. J. H. MACOMBER, Judge.

FILED, MAY 12, 1888.

VOL. 74—27

ACTION on a promissory note. Defense, failure of consideration and breach of warranty. The court instructed the jury to return a verdict for plaintiff. A verdict was so returned, and judgment rendered thereon in favor of plaintiff. Defendant appeals.

L. A. Berry, for appellant.

C. W. Rollins, for appellee.

ROBINSON, J.—The defense of defendant is set out in the fourth and fifth divisions of his answer. The making of the note is admitted in each. The fourth division as amended alleges a failure of consideration of the note, in that it was given for a threshing-machine separator, which plaintiff warranted to do good work, and agreed to make do good work, and that the separator proved to be worthless, and was not made to work according to the agreement. The fifth division alleges that the note in suit was given for a threshing-machine purchased by defendant of plaintiff; that plaintiff in writing warranted said machine to do good and perfect work, and agreed to surrender the note and take back the machine in case it did not work as warranted, upon receiving notice of that fact; that said machine failed to work as warranted, and was utterly worthless save for iron and fire-wood; that plaintiff was promptly notified of said failure and requested to take back the machine and return the note, but failed so to do. Defendant further alleges that he is not able to attach a copy of the warranty to his answer for the reason that it is lost.

I. Defendant was permitted to testify without objection as to the contents of the written warranty referred to in his answer. He was then asked to state how the separator operated. This question was objected to by plaintiff on the ground that it was incompetent, immaterial and irrelevant, and the objection was sustained. Defendant attempted to prove by another witness that the machine was worthless except for old iron

Garretson v. The Equitable Mut. Life & Endowment Ass'n.

and fire-wood, and that it never did good work. This was objected to by plaintiff "as incompetent, immaterial and irrelevant at this stage of the case, for the reason that they have laid no foundation for the testimony." The objection was sustained. These rulings of the district court are assigned as errors. We infer from the arguments of counsel that the objections were sustained on the theory that defendant had failed to lay the foundation for proving the contents of the warranty by oral testimony; hence that no warranty had been shown. The answer to this is that the oral evidence of the terms of the warranty was introduced without objection, and, after it was shown that due diligence to obtain the writing itself had not been used, no effort was made to exclude the evidence already given. We do not think the competency of this evidence could be called in question by objections made to evidence which was of itself proper. But the evidence excluded would have been proper even if there had been no evidence of warranty. The fourth division of the answer pleaded a failure of consideration, and the evidence objected to would have tended to sustain that plea.

II. Other questions discussed by counsel are not likely to arise on another trial, and need not be considered. For the errors pointed out the case is

REVERSED.

GARRETSON V. THE EQUITABLE MUTUAL LIFE AND
ENDOWMENT ASSOCIATION.

1. **Appeal: EVIDENCE TO SUPPORT VERDICT.** There being a fair conflict in the evidence upon which the jury found that defendant did not mail a notice of assessment to the assured, this court cannot disturb that finding.

74	419
97	233
97	241

Garretson v. The Equitable Mut. Life & Endowment Ass'n.

2. ——— : ONLY QUESTIONS RAISED BELOW CONSIDERED. In an action at law on a certificate of insurance on the assessment plan, the court's instructions, which were not excepted to, allowed a verdict not to exceed twenty-five hundred dollars, and a verdict for that amount was returned. No motion in arrest of judgment was made, and no claim presented that the verdict should have been for a merely nominal amount, nor that an action at law would not lie, nor that a judgment at law could not be rendered against the defendant, under the doctrine of *Newman v. Covenant Mut. Ben. Ass'n*, 72 Iowa, 242. Held that those claims could not now be urged in this court, and that the verdict could not be disturbed as being excessive.

Appeal from Black Hawk District Court.—HON. D. J. LENEHAN, Judge.

FILED, MAY 12, 1888.

THIS is an action upon a certificate of insurance upon the life of one Mary Garretson. There was a trial by jury, and a verdict and judgment for plaintiff. Defendant appeals.

J. J. Tolerton and O. C. Miller, for appellant.

Whiting S. Clark, for appellee.

ROTHROCK, J.—I. The defendant is a mutual life insurance company organized upon the assessment plan. It issues certificates of insurance to its members upon the payment of a membership fee, and upon the agreement to pay assessments to cover losses by the death of its members. The certificate and by-laws of the company provide that, upon failure to pay any assessment at the home office within thirty days after the date of notice of the loss, the certificate shall be forfeited; and the mailing of the notice of assessment at Waterloo, Iowa, was to be regarded as notice of the loss. A certificate of twenty-five hundred dollars was issued to Mary Garretson on the first day of April, 1884, and she died on the twenty-ninth day of August, 1885. The plaintiff is the beneficiary under her certificate, and brought this action

1. APPEAL:
evidence to
support
verdict.

Garretson v. The Equitable Mut. Life & Endowment Ass'n.

to recover the amount of the certificate. The defendant, by its answer, admitted the issuance of the certificate, but pleaded that the same was forfeited, before the death of Mary Garretson, by a failure to pay an assessment made for a loss, which was duly levied on the fifteenth day of January, 1885; that the assured was duly notified by mail of said loss, on said fifteenth day of January, 1885, and failed to pay the same within thirty days; and that, by reason of such failure, she forfeited her certificate, and the plaintiff is not entitled to recover any amount thereon. The plaintiff, by way of reply, averred that the notice of the death loss, dated January 15, 1885, was not mailed to the insured, but, with two other notices inclosed in an envelope, was mailed to Flora Garretson, the plaintiff, but that it was never received by the insured, nor by the plaintiff, until after the death of Mary Garretson. Other facts were pleaded in the reply, which it was claimed constituted a waiver of the failure to pay the said amount; but, as we view the case, they are not material to be considered in determining this appeal. The court submitted to the jury two questions, the answers to which were required to be returned with the general verdict. These questions, with the answers, were as follows: "(1) Did the defendant cause a notice to be mailed to Mamie Garretson, directed to her address, as provided by the conditions on the back of certificate, in January, 1885, notifying her of assessment No. 12? No. (2) Soon after the expiration of thirty days from the mailing of said notice, did the defendant cause a postal-card to be deposited in the post-office at Waterloo, Iowa, directed to the address of Mamie Garretson, Des Moines, Iowa, notifying her that the books of the office show assessment No. 12 to be unpaid? No." There was a controversy upon the trial as to whether the defendant, in addition to the notice of assessment, mailed a postal-card to the insured after the expiration of thirty days from the mailing of the notice. The court instructed the jury upon this point in the case as follows:

Garretson v. The Equitable Mut. Life & Endowment Ass'n.

"If you find from the evidence that no notice was ever mailed to the insured, Mamie Garretson, of the assessment made January 15, 1885, and that she never received any notice or had any knowledge of the levying of said assessment by the defendant company, then your verdict should be for the plaintiff upon this issue in the case."

The instruction given by the court to the jury was not excepted to by either party. It is therefore apparent that, under the above instruction, and the answers to the questions returned by the jury, all other questions, such as waiver and the like, are out of the case, provided the evidence warranted the jury in answering the questions as they did. The defendant insists that the answers to the questions are unsustained by the evidence. The evidence as to this question is in conflict. It appears that two others of the same family were holders of certificates of insurance issued by the defendant, and we think the jury may fairly have found from the evidence that no notice was mailed to Mary Garretson, but that all three of the notices to the members of the family were mailed to one of the others, and that it was never seen by the insured, and that she had no knowledge of the assessment during her life. We do not deem it necessary to set out the evidence on this point. It is sufficient to say that we are satisfied we ought not to interfere with the verdict as being contrary to the evidence.

Objections were made by defendant to certain evidence of conversations had with the agent of the defendant who induced the insured to become a member of the company. This evidence tended to show a waiver of the conditions providing for a forfeiture. These and other objections to evidence need not be considered; for, as we have seen, the question of waiver is out of the case. The verdict of the jury is not based upon a waiver of forfeiture, but upon the ground that there was no forfeiture, and we do not think that there is any ground for certain objections made to the evidence introduced by the plaintiff, upon the question of fact

Garretson v. The Equitable Mut. Life & Endowment Ass'n.

as to whether the insured had notice of the assessment, for the failure to pay which the defendant claims a forfeiture.

II. It is insisted that the verdict is excessive, and that it should have been for merely a nominal amount.

2. — : only questions raised below considered. The verdict is for twenty-five hundred dollars, the full amount of the certificate. The evidence showed that an assessment on members liable to pay at date of August 29, 1885, would have realized \$2,588.88 if all members had paid, and that an assessment made at the time of the trial would have made \$2,073 if all had paid; and the court instructed the jury, upon that question, as follows: "A statement has been introduced in evidence showing what the amount of one full assessment upon all the members in the association at the time of the death of the insured would be; and the plaintiff would be entitled to interest on the amount you find, if anything, at six per cent. per annum from a time sixty days after notice to the defendant company of the death of the insured; and, if you find for the plaintiff, you will compute the amount she is entitled to, and return your verdict for the amount you find, not exceeding the sum of twenty-five hundred dollars."

As we have said, the instructions of the court were not excepted to, and the motion for a new trial made no claim that the verdict should have been for a merely nominal amount. It is claimed that the verdict was excessive. No motion in arrest of judgment was made, and no claim was at any time presented that an action at law would not lie, nor that no judgment at law could be rendered against the defendant. If counsel are to be understood as making this claim now, it comes too late. No question can be presented here which was not presented to the court below. The rule is so well understood that we need not cite authority in its support. It is proper to say that the cause was tried in the court below before the case of *Newman v. Cov. Mut. Ben. Ass'n*, 72 Iowa, 242, and other cases against assessment insurance companies, were decided by this court. Under

Fisk v. The Chicago, M. & St. P. Ry. Co.

the instructions of the court to the jury, and upon the theory by which the cause was tried in the district court by both parties, the verdict cannot be said to be excessive. We are united in the conclusion that the judgment should be

AFFIRMED.

FISK V. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

1. **Instructions :** NOT WARRANTED BY PLEADINGS OR PROOF. It is error to give instructions based on facts not pleaded, and of which there is no evidence. (For illustrations and authorities cited, see opinion.)
2. **Verdict:** INDEFINITE ANSWERS TO SPECIAL INTERROGATORIES. Where the evidence is insufficient to enable the jury to answer special interrogatories in the affirmative, negative answers should be given in clear and decided language; and where such answers are so uncertain and evasive that it cannot be determined whether they accord or conflict with the general verdict, they ought not to be allowed to stand. (See opinion for illustrations.)

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

FILED, MAY 14, 1888.

THE petition states that the defendant negligently left a freight car standing in and upon a public highway running through the town of Peralta, on defendant's railway, and that A. Bolton was passing along such highway, driving a team of two horses attached to a wagon; that said car was so placed upon said highway that a large portion thereof was occupied by the same, and the free passage of the highway was obstructed by said car; that said Bolton, in attempting to pass the car with said team, was "crowded for room, and his team, taking fright at said car, became and was unmanageable and ran away," whereby Bolton was greatly injured;

74	424
78	202
74	424
118	346

Fisk v. The Chicago, M. & St. P. Ry. Co.

“that plaintiff has been duly appointed and is now acting as trustee of the said Bolton, and others beneficially interested in the prosecution of this claim, and, as such, is fully authorized to bring and maintain the action.” Trial by jury. Verdict and judgment for plaintiff. The defendant appeals.

Mills & Keeler, for appellant.

Henry Rickel, for appellee.

SEEVERS, C. J.—I. The grounds on which plaintiff seeks to recover, briefly stated, are:

1. INSTRUCTIONS: (1) That the highway was obstructed by the
not warranted by
pleadings or
proof. car; and (2) that the team took fright at
said car. In the seventh and eighth paragraphs of the charge, the court, in substance, instructed the jury:

“And if you further find, from all the evidence, that said car, placed and left where you may find from the evidence it was placed and left, was an object apt to frighten horses of ordinary gentleness, * * * then you would be warranted in finding that defendant was guilty of negligence.”

We think this instruction was erroneous, for the reason that it was not alleged that the car, placed as it was, was apt to frighten horses of ordinary gentleness. The only material questions were: Was the highway obstructed by the car, and did the horses become frightened at the car? and not whether horses of ordinary gentleness were apt to become so. There was no such issue, and there was no evidence introduced tending to establish such fact. The recovery must be obtained on the grounds stated in the petition, and not on another and different ground. *Manuel v. Chicago, R. I. & P. Ry. Co.*, 56 Iowa, 656. See, also, *Gilbert v. Flint & P. M. Ry. Co.*, 51 Mich. 488; s. o., 16 N. W. Rep. 868; *O'Donnell v. Chicago, M. & St. P. Ry. Co.*, 69 Iowa, 102.

II. There was evidence tending to show that the horses driven by Bolton became frightened at or when

Fisk v. The Chicago, M. & St. P. Ry. Co.

THE SAME. crossing a bridge, and that he whipped them, which caused them to run, and that they were unmanageable, and beyond his control, before and at the time he reached the crossing. The court instructed the jury as follows:

“If you find from the evidence that, before reaching the crossing, said Bolton’s team became unmanageable, and ran away, either from fright or whipping or both, and, while running over said crossing, they shied at the freight car standing at or on said crossing, and caused the accident, then the injury was not caused by any negligence of defendant, unless the jury find that such accident would have occurred if said team had not become so frightened or run before reaching said crossing.”

The evidence tended to show that the highway was fifty feet wide, and that planks were laid down across it, and that the travel crossed on said planks, which were twelve or fourteen feet long, and that the car stood on, or the bumper projected some distance, not exceeding three to five feet, over the planked way. Counsel for appellant contend that the latter portion of the foregoing instruction is erroneous, and their position must be sustained. There is not a single fact or circumstance in the case upon which such portion of the instruction can be properly based. There was sufficient room for the team to have passed over the plank-way, although the car projected over it; and if the team became frightened, was whipped, and was beyond control before reaching the crossing, there is no evidence tending to show that the accident would have occurred if the team had not become so frightened.

III. The court instructed the jury: “In determining the amount of the recovery you may find the plaintiff entitled to, you will also consider
THE SAME. the age and capacity of said Bolton, at the time of the accident, to work, his business, the amount of his earnings and his capacity to earn money.” Bolton was seventy-two years old, and a farmer, but there was no evidence tending to show his earnings, except

Fisk v. The Chicago, M. & St. P. Ry. Co.

that Bolton testifies that the accident "knocked off forty per cent." of his ability to labor; but this has no tendency to show his earnings either before or after the accident. *Gardner v. Burlington, C. R. & N. Ry. Co.*, 68 Iowa, 592.

IV. The court submitted certain interrogatories to the jury, which, and the answers thereto, are as follows:

2. VERDICT :
indefinite
answers to
special inter-
rogatories.

"(1) Did Bolton see the freight car standing on the north side-track, and the situation of said car, before he drove his team upon the tracks? A. He saw the car on the north side-track. (2) Was said freight car, and its actual position, in open and plain sight to Bolton before he drove upon defendant's tracks? A. As to the actual position we cannot say. * * * (5) Was Bolton's team a young team, liable to become frightened at cars standing on or near the highway? A. Colts about as other colts. (6) Do you find that Bolton's team was a safe one to drive past freight cars in the manner it was actually driven? A. As safe as ordinary colts. * * * (8) Was Bolton's team one of ordinary gentleness in respect to becoming frightened at cars standing in, or partly in, the highway? A. Yes; for a young team."

The defendant filed a motion for a new trial, on the ground, among others, that the answers to the second, fifth, sixth and eighth interrogatories are uncertain and evasive. If the evidence was insufficient to enable the jury to answer the interrogatories in the affirmative, a negative answer should have been given in clear and decided language. There is no escape from the conclusion that the jury could and should have responded by simply saying "Yes" or "No." Had this been done, the legal effect of such findings could have been determined; but there is no legal standard by which the effect of the foregoing answers can be ascertained, and whether they accord or conflict with the general verdict it is impossible to determine.

Counsel for the appellant insist that it affirmatively appears that the plaintiff cannot maintain this action, because he is not a real party in interest; and it is

Brown v. The State Ins. Co.

insisted that he cannot recover, because Bolton was guilty of contributory negligence; but, as the evidence may not be the same on another trial, no beneficial result would be obtained by determining such questions now. There are errors assigned on rulings of the court in admitting and rejecting evidence which will probably not occur on another trial, and are therefore not determined.

REVERSED.

BROWN V. THE STATE INSURANCE COMPANY.

1. **Evidence: UNAUTHENTICATED LETTER: ERROR WITHOUT PREJUDICE.** There is no prejudice, and therefore no reversible error, in admitting in evidence a letter not fully authenticated, when its only effect is to establish a fact already established by testimony not objected to.
2. **Fire Insurance: POWER OF ADJUSTING AGENT TO WAIVE CONDITIONS.** Where a claim for loss of insured property is placed by the company in the hands of an agent for adjustment, it will be presumed that he is authorized to do whatever is required to be done in adjusting the loss; and, in this case, *held* that such an agent was presumed to have authority to waive the requirement of the policy as to keeping books and invoices in a fire-proof safe. (*Hollis v. State Ins. Co.*, 65 Iowa, 454, *distinguished*.)
8. **—: WAIVER OF CONDITIONS OF POLICY: WHAT AMOUNTS TO.** Where a policy of fire insurance required the insured to keep his books and invoices in a fire-proof safe, or in such a manner as to avoid danger of their being destroyed with the insured property; but he kept them in a wooden desk in the building with the insured goods, and they were all burned together; *held* that the company waived the requirement, when, upon being informed of the facts, it demanded that the insured obtain, and induced him to incur trouble and expense in procuring, duplicates of the burned invoices, to be used instead of the originals in adjusting the loss. (*Hollis v. State Ins. Co.*, 65 Iowa, 454, *followed*, and *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 885, *distinguished*.)

Appeal from Polk District Court.

FILED, MAY 14, 1888.

ACTION on a fire insurance policy. Verdict and judgment for plaintiff. Defendant appeals.

74	428
102	580
74	428
113	648
74	428
128	580

Cummins & Wright, for appellant.

J. K. Macomber and *George A. Underwood*, for appellee.

REED, J.—The property insured was a stock of merchandise. The policy was issued on a written application, which was endorsed on the policy when it was issued, and which contained the following agreement: “Applicant further agrees to keep a set of books showing all purchases and sales for cash and credit separately, and to keep a copy of the last inventory; and that said books and inventory shall be kept in a fire-proof safe, or in such a manner as to avoid danger of their being destroyed with the property hereby insured.” Defendant pleaded a breach of this undertaking, and plaintiff in reply pleaded a waiver of such breach. The evidence showed without any conflict that plaintiff did not keep his books and inventory in a fire-proof safe, but kept them in a wooden desk in his store, and that they were destroyed by the fire that destroyed the insured property. The matter relied on by plaintiff as constituting a waiver of this breach of his agreement is that defendant, with full knowledge of the manner in which the books and inventories had been kept, and that they had been destroyed by the fire, required him to procure and produce copies of all invoices and bills of goods purchased by him for a number of years before the fire, and that, in obedience to such demand, he did, at great expense and trouble, procure copies of such bills and invoices, and submitted them to defendant. The evidence shows that defendant, when it received notice of the fire and a proof of the loss furnished by plaintiff, placed the claim in the hands of C. F. Leavitt, one of its adjusters, who went to the scene of the fire and examined plaintiff with reference to the circumstances of the loss. In his examination, plaintiff disclosed the facts as to the destruction of the books and inventories, and the manner in which they had been

Brown v. The State Ins. Co.

kept. After the examination was closed, Leavitt served upon plaintiff a notice in writing, as follows: "You are hereby notified and required to furnish, at your earliest convenience, * * * the State Insurance Company of Des Moines your original bills of purchase, or, if they are lost or destroyed, you will furnish certified copies thereof procured from the various houses from which you have bought goods. These must cover all your purchases from the time you bought the stock of A. P. Condit to time of fire which destroyed said stock. This demand is made under the conditions of the policy you hold of said company. See 'Proceedings in Case of Loss.'" In compliance with this demand, plaintiff did procure from such of the wholesale houses with which he had dealt as continued in business copies of the invoices of the goods purchased by him from them during the time covered by the demand. In doing that he spent considerable time, and incurred some expense and inconvenience. He notified defendant that he had procured them, and Leavitt again went to his place and examined them, and it was not until after that was done that defendant refused to pay the loss.

I. The district court, against defendant's objection, admitted in evidence a letter received by plaintiff, and which purports to have been written by Leavitt. The letter is written on defendant's letter-head, and purports to have been written at its agency at Kansas City, Mo., but there was no evidence of the genuineness of Leavitt's signature to it. It points out a number of particulars in which the proof of the loss and the accompanying papers are alleged to be insufficient, and states that certain things are demanded; but whether it was meant by this that they were demanded by the provisions of the policy, or by the company, for the perfecting of the proofs, is not clear. The objection urged against its admission is that it was not shown to have been written by Leavitt. But, in the view we take of the case, it is not necessary to go into that question, for,

1. EVIDENCE:
unauthen-
ticated letter;
error without
prejudice.

Brown v. The State Ins. Co.

according to plaintiff's testimony, he incurred the labor and expense of procuring the duplicate invoices in obedience to the demand made upon him by Leavitt at the close of the examination; and, if it should be conceded that the demands of the letter were for the perfecting of the proof, they were but a repetition of the former demand, and were consequently immaterial. Defendant could not, therefore, have been prejudiced by the admission of the letter; and, conceding that there was error in its admission, it affords no ground for disturbing the judgment.

II. There was no direct evidence as to the extent of Leavitt's authority, and it was urged that, as the verdict necessarily implies a finding by the

2. FIRE INSURANCE: power of adjusting agent to waive conditions.

jury that he had authority to waive the forfeiture, it is without the support of evidence. Counsel contended that the case on

this point is governed by *Hollis v. State Ins. Co.*, 65 Iowa, 454. But there is a clear distinction between the cases. In that case it was proven simply that an alleged agent was an adjuster of the insurance company, and that he called on the plaintiff with reference to the loss. It was not shown that the particular claim in question had been placed in his hands for adjustment, and we held, on that state of the evidence, that it could not be presumed that he had authority to do the particular thing which it was held would, if it were done by the authority of the company, amount to a waiver of the forfeiture. But in the present case it was shown by the secretary of the company that the claim was placed in Leavitt's hands for adjustment. He was the agent of the company, then, for the transaction of that particular business; and it will be presumed that he was authorized to do whatever was required to be done in adjusting the loss; and the verdict, so far as this question is concerned, is supported by that presumption.

III. The remaining question is whether the act of the agent in demanding that plaintiff procure the copies

Brown v. The State Ins. Co.

3. —: waiver
of conditions
of policy:
what amounts
to.

of the bills and invoices of his purchases, and submit them to the company for examination, amounted to a waiver of the forfeiture. In the *Hollis case*, we held that if the insurer, with knowledge of the facts constituting the forfeiture, continues to treat the contract as of binding force, and induces the insured to act upon that assumption, and incur expense and trouble while acting in that belief, he cannot afterwards go back and take advantage of the forfeiture. The facts of this case bring it within that holding. When defendant was informed of the destruction of the books and inventories, and the manner in which they had been kept, it had the right—assuming that those facts constituted a forfeit, as the court below held they did—at once to stand upon the forfeiture and declare the contract at an end. But it had the right, also, to waive the forfeiture and treat the contract as still in force, leaving the question whether it would pay the loss to depend upon subsequent investigation as to other facts. By its demand for the production of the copies of the invoices and bills, it made this latter election, for it thereby required plaintiff to produce for its inspection the evidence as to other facts upon which the question of its liability, independent of the forfeiture, depended. Having required plaintiff to incur the labor and expense of procuring the bills and invoices, and having obtained whatever advantage accrued from their production, it would be manifestly unjust to permit it now to go back and take advantage of the forfeiture. The facts of the case do not bring it within the holding of *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335. In that case, the oral information as to the facts constituting the forfeiture was not full, and it was held that the insurer did not waive it by requiring written proof as to those facts, that being the character of evidence required by the policy. But in the present case the oral information as to the facts was full, and the additional evidence required relates to other matters. The judgment of the district court will be

AFFIRMED.

Paddleford v. Cook.

74	433
102	142
102	370

PADDLEFORD *et al.* v. COOK.

1. **Practice : PETITION FILED TOO LATE : RIGHT TO DISMISSAL : WAIVER BY ANSWERING.** Where the petition was not filed until after the time fixed therefor in the notice, it was error for the court to refuse to dismiss the case upon defendant's motion (see Code, sec. 2600; *Cibula v. Pitt's Sons' Manf. Co.*, 48 Iowa, 528); but this error was waived by defendant's then appearing and answering the petition, thus giving the court jurisdiction of his person—it having already jurisdiction of the subject-matter of the action.
2. **Evidence : VALUE OF LAND AS BEARING ON CONTRACT PRICE.** Where the issue was as to the price orally agreed to be paid for land, *held* that evidence of the value of the land was relevant. (See *Johnson v. Harder*, 45 Iowa, 667).
3. **— : EXCLUSION OF : INTENT NOT SHOWN.** This court cannot say that it was error to exclude answers to certain questions, when it was not shown, and does not appear, what evidence was intended to be elicited.
4. **Appeal : PRACTICE : INSTRUCTIONS NOT EXCEPTED TO.** This court cannot review instructions to which the record does not show that exceptions were taken.

Appeal from Story District Court.—HON. JOHN L. STEVENS, Judge.

FILED, MAY 14, 1888.

ACTION to recover for land sold and conveyed by plaintiffs to defendant, the price being fixed by an oral agreement of the parties. There was a judgment on a verdict for plaintiffs. Defendant appeals.

J. F. Martin, for appellant.

Funson & Gifford, for appellees.

VOL. 74—28

BECK, J.—I. The petition was not filed until after the time fixed therefor in the notice. The defendant moved the court, on this ground, to dismiss the action. The motion was overruled and an exception taken to the ruling. Thereupon defendant answered the petition, denying its allegations and averring payment in full for the land, and that the deed did not express the true consideration agreed to be paid for it.

1. PRACTICE:
petition filed
too late: right
to dismissal:
waiver by
answering.

II. It is first insisted that the district court erred in overruling the motion to discontinue the case. This position is undoubtedly correct. Code, section 2600, provides that, if the petition is not filed within the time fixed in the notice, it "will be deemed discontinued."

III. But, upon the refusal of the district court to dismiss the petition, it was still pending. Defendant, by his answer, appeared to the action, and waived the irregularity in the notice or filing of the petition, just as he would have waived the want of a notice had he answered without service upon him. The pendency of the petition gave the court jurisdiction of the subject-matter of the action, and the appearance by answer gave it jurisdiction of the person of defendant.

IV. It cannot be said, as is claimed by defendant's counsel, that the court had no jurisdiction of the case, and that appearance did not confer it. It did have jurisdiction of the case, for the petition, which is the foundation of the jurisdiction of the subject-matter, was pending when defendant filed his answer. Appearance to insist upon the discontinuance of the cause would not have given the court jurisdiction of the person of defendant (*Cibula v. Pitt's Sons' Manuf. Co.*, 48 Iowa, 528), but by an appearance to plead to the action and enter full defense, the defendant surrenders himself to the jurisdiction of the court. No decision of this court is in conflict with these views.

V. Evidence was admitted, against defendant's objection, tending to show the value of the land. In our

Paddleford v. Cook.

opinion, it was pertinent and competent.
 2. EVIDENCE: value of land as bearing on contract price. The issues involved the question as to the sum to be paid under the oral contract, which was in dispute. The evidence as to the value of the land would have some bearing on this question, as the inference might be drawn that the parties probably were guided, in fixing the consideration to be paid for the land, by its value. *Johnson v. Harder*, 45 Iowa, 677.

VI. A witness for defendant was asked to state what was said by the parties, at a specified time, in regard to the transaction. It does not
 3. —: exclusion of: intent not shown. appear what evidence was expected to be elicited by the question. Under familiar rules recognized by this court, we cannot hold the exclusion of evidence to be erroneous, when the character or effect of such evidence is not shown. No such showing is made, nor does it appear that the witness could have made any response to the question if permitted to answer it.

VII. Instructions given to the jury are complained of, but it is not shown that exceptions were
 4. APPEAL: practice: instructions not excepted to. taken to them. We cannot therefore consider the objections thereto urged by defendant's counsel.

VIII. The verdict is sufficiently supported by the evidence. These views cover all questions in the case. The judgment of the district court is

AFFIRMED.

GRIFFIN & ADAMS V. HARRIMAN.

1. **Appeal: JURISDICTION: AMOUNT.** Where plaintiffs in their petition demanded one hundred and twenty-five dollars, *held* that, had they recovered the full amount of their demand, it would have been one hundred and twenty-five dollars, with interest from the commencement of the action; so that a subsequent tender of twenty-five dollars and costs did not reduce the amount in controversy to one hundred dollars, and did not deprive plaintiffs, upon the rendition of a judgment in their favor for twenty-five dollars, of the right to appeal to this court without a certificate of the trial judge. (See cases cited in opinion.)
2. **Pleading: WHAT ADMITTED BY TENDER.** A tender by defendant in an action admits that the amount tendered is due, but does not necessarily admit all alleged grounds of recovery. Whether these, or any of them, are admitted, must be determined by the pleadings.
3. **Verdict: SETTING ASIDE: AFFIDAVITS OF JURORS: FACTS INHERING, AND NOT INHERING, IN VERDICT.** A verdict cannot be set aside upon the affidavits of jurors, showing that they were unduly influenced by a fellow-juror; for such fact inheres in the verdict. (See cases cited in opinion.) But where a juror, upon what he alleges to be his own personal knowledge, testifies in the jury-room to facts bearing directly upon the issue involved, *held* that such misconduct may be shown by the affidavits of jurors, and is good ground for setting aside the verdict. (See opinion for authorities followed and distinguished.)

Appeal from Clay District Court.—HON. GEORGE H. CARR, Judge.

FILED, MAY 14, 1888.

ACTION to recover rent for the use of land. Defendant tendered twenty-five dollars and costs. The case was tried to a jury, and verdict returned in favor of plaintiffs for twenty-five dollars. Plaintiffs filed a motion for a new trial, which was overruled. Plaintiffs appeal.

Parker & Richardson, for appellants.

Hughes & Chamberlain, for appellee.

ROBINSON, J.—Plaintiffs allege that they are the owners of a quarter-section of land, which is described; that from January 1, 1882, to March 1, 1887, the defendant used, occupied and cultivated the same, and that such use and occupation were worth the sum of one hundred and twenty-five dollars, which is now due and unpaid. Plaintiffs demand judgment for that sum, with interest and costs. The answer denies all indebtedness in excess of twenty-five dollars.

I. The first question raised for our determination is whether or not the amount in controversy exceeds one hundred dollars. It is not shown when the action was commenced, but the petition appears to have been filed April 15, 1887.

The tender was made on the twenty-third day of that month. Had plaintiffs established their claim in full, they would have been entitled to recover, in addition to the amount of the tender, the sum of one hundred dollars, and interest from the commencement of the action. *Anderson v. Kerr*, 10 Iowa, 233. The amount in controversy therefore exceeds one hundred dollars. *Holmes v. Hull*, 48 Iowa, 177; *Dryden v. Wyllis*, 51 Iowa, 534. The appeal will be considered without reference to the certificate of the trial judge as to questions of law.

II. The court charged the jury that, under the issues and evidence in the case, “the plaintiffs are entitled to recover from the defendant the fair rental value of the use of so much of the premises described in plaintiffs’ petition as was actually occupied and cultivated by him from January 1, 1882, to March 1, 1887.” The same rule was substantially announced in another portion of the charge. Appellants insist that, by his tender, the defendant admits their cause of action, and the only question to be determined is the amount of their recovery, and that such amount should be determined, not by the rental value of the portion of the land actually occupied, but

1. APPEAL: jurisdiction: amount.

2. PLEADING: what admitted by tender.

 Griffin & Adams v. Harriman.

from that of the entire tract. The tender admits that the amount so tendered is due. *Phelps v. Kathron*, 30 Iowa, 231. It does not, however, necessarily admit all the alleged grounds for recovery. That must be determined by the pleadings. It is true that plaintiffs allege that all the quarter-section was used and occupied by defendant. But the first division of the answer is a general denial in effect; and the second states that, if defendant is indebted to plaintiffs, the amount of such indebtedness does not exceed twenty-five dollars, and that said sum has been tendered and paid into court. It cannot fairly be claimed that anything is admitted by the answer, excepting that the amount tendered is due to plaintiffs on a cause of action included in their suit. It does not admit that defendant used the premises described during all the time named, nor that he used them at any time.

III. One of the grounds of the motion for a new trial was misconduct of members of the jury. It was sustained by affidavits of jurors. Two of the

8. VERDICT :
 setting aside :
 affidavits of
 jurors : facts
 inhering, and
 not inhering,
 in verdict.

jurors swear "that one J. P. Smith, who was a trial juror on said cause, after he got into the jury-room to deliberate on a verdict, stated to the jury that he was personally acquainted with the premises in controversy, and that the land was very poor land, to his personal knowledge; and he used said alleged fact in argument, and for the purpose of influencing the jury to find for plaintiff in the sum of twenty-five dollars; and said fact influenced him in rendering a verdict as rendered in this cause." The affidavits of two other jurors were to the same effect, and, in addition, stated that Smith claimed that, as he had personal knowledge of the character of the land, that fact should be taken as corroborating defendant's witnesses. Smith was examined orally, but testified to nothing which contradicted the affidavits in any material matter. On the contrary, he admitted that he told the jury he had been over the land twice a year for four years; that he told them he thought it was poor land; that it was about such land as the testimony

Griffin & Adams v. Harriman.

showed; that a part of the jury were inclined to discredit the evidence of the witnesses for the defense; that he gave no evidence intended as evidence,—it was merely bearing on the credibility of witnesses. Two other jurors corroborated Smith. Defendant moved to strike the affidavits referred to from the files, and the motion was sustained. Appellants complain of this action, and of the action of the district court in overruling the motion for a new trial as to the ground in question. Appellee insists that the facts set out in the affidavits necessarily inhere in the verdict, and therefore that the affidavits of the jurors cannot be received to show them, because the verdict cannot be impeached by proof of such facts. Some of the facts set out in the affidavits were undoubtedly of the character alleged by appellee. The verdict cannot be set aside by showing that a juror was “unduly influenced by his fellow-jurors.” *Bingham v. Foster*, 37 Iowa, 341; *Dunlavey v. Watson*, 38 Iowa, 402; *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa, 198. Hence the objection of appellee is well taken as to all averments of the affidavits which charged, in effect, that the jurors were influenced by what Smith said. The fact that they were or may have been so influenced, cannot be proven in that manner. But the affidavits also show that Smith made statements to the jury in regard to the quality of the land in controversy. These statements were made from personal knowledge, and tended directly to support defendant’s side of the case. The value of the use of the land depended, in part, upon its quality. Hence that was a material issue. The plaintiffs contended that the land was good, and the defendant that it was poor. The evidence in regard to its quality was conflicting. Hence the statements of Smith, made from personal knowledge, could hardly have been without weight. We think it was error to strike the affidavits from the files, and to disregard the ground of the motion which they were designed to sustain. *Hall v. Robinson*, 25 Iowa, 93. “The jury were bound to determine the case upon the evidence admitted by the court.” “That a jury

Griffin & Adams v. Harriman.

cannot be permitted, by adding evidence, to make a case different from that, which they took with them to their room, is well settled." *Kruidenier v. Shields*, 70 Iowa, 429. See, also, *McLeod v. Humeston & S. Ry. Co.*, 71 Iowa, 138; *State v. Cowan*, ante, p. 53.

IV. Appellee insists that the ruling of the district court on the motion for a new trial was authorized by decisions of this court rendered subsequent to that in *Hall v. Robinson*, supra. Three cases are cited as sustaining this view. Of these the first (*Cowles' Adm'x v. Chicago, R. I. & P. Ry. Co.*, 32 Iowa, 515) is in entire harmony with our decision in this case. The second (*Bingham v. Foster*, 37 Iowa, 341) is based on the fact that the substance of the affidavit was "a showing that the juror was unduly influenced by his fellow-jurors in the determination of the verdict, rather than improper conduct on the part of other jurors sufficient to vitiate the verdict." A casual reading of the third case cited (*Dunlavey v. Watson*, 38 Iowa, 402) might seem to justify the claim of appellee; but a careful examination will disclose the fact that, in the opinion of this court, the affidavit was designed to show, not misconduct on the part of a juror, but that the verdict of the jury was the result of undue influence. *Hall v. Robinson* was not overruled, nor was any attempt made to establish a rule in conflict with the one therein announced.

We conclude that the motion for a new trial should have been sustained.

REVERSED.

THE STATE V. ILL.

74	441
96	310
74	441
126	560

Criminal Law : APPEAL FROM JUSTICE'S COURT : POWER OF DEFENDANT TO WAIVE JURY TRIAL. Where one has been tried and convicted upon an information in a justice's court, and he appeals to the district court, he has the power to waive trial by jury in the appellate court, and to submit to a trial by the court ; and where he does so, and is so tried, and is found guilty, and judgment is rendered against him, he cannot afterwards insist that the court had no right to try him without a jury. (*State v. Carman*, 63 Iowa, 130, and *State v. Larrigan*, 66 Iowa, 426, in which cases the trials were on indictments, distinguished.)

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, MAY 14, 1888.

THE defendant was tried by a jury in a justice's court on an information which charged him with having owned and kept intoxicating liquors, with intent to sell the same contrary to law. He was convicted and adjudged to pay a fine. From that judgment he appealed. In the district court he consented to a trial without a jury, and was again convicted ; and, from the judgment rendered, appeals to this court.

Baylies & Baylies, for appellant.

A. J. Baker, Attorney General, for the State.

ROBINSON, J.—The only question presented by this appeal is the power of the defendant to waive his right to a trial by jury in the district court. It is contended by appellant that such right did not exist, and that this case falls within the rule announced in *State v. Carman*, 63 Iowa, 130, and *State v. Larrigan*, 66 Iowa, 426. In each of those cases the defendant was tried on an indictment, and it was held that section 4350 of the Code was

 Clements v. The Burlington, C. R. & N. Ry. Co.

an imperative provision, which excluded the jurisdiction of the court, without a jury, to try an issue of fact presented by indictment. In this case, defendant was accused, by information, of an offense of which the district court had only appellate jurisdiction. Section 4702 of the Code provides that a case of this kind "shall stand for trial anew in the district court in the same manner as it should have been tried before the justice." It should have been tried before the justice in one of two modes: either by the court or by a jury. The provisions of the Code which apply in this case are as follows: "Sec. 4669. Upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the justice must proceed to try the issue, unless a change of venue be applied for by defendant." "Sec. 4672. Before the justice has heard any testimony upon the trial, the defendant may demand a trial by jury." It will be noticed that the proper manner of trying a case of this kind in justice's court is to try it to the justice, unless a jury is demanded by defendant. In other words, if he fail to demand a jury, he waives the right to be tried by one. This being the case in justice's court, and the cause being triable in the same mode or manner in the district court, the defendant had the power to consent to a trial to the court. He was not denied the right to a trial by jury, and cannot now be heard to complain that he was not so tried.

AFFIRMED.

74	442
94	559

74	442
104	601
105	672

74	442
107	64
74	442
130	671

**CLEMENTS V. THE BURLINGTON, CEDAR RAPIDS &
NORTHERN RAILWAY COMPANY.**

Evidence : VALUE OF NURSERY STOCK : PRICE AT WHICH CONTRACTED.

Where the question was as to the value of a lot of fruit trees at the place of their destination on a railroad, *held* that evidence of the price at which the owner had contracted to sell them there was admissible, as affording some evidence of their value there.

Clements v. The Burlington, C. R. & N. Ry. Co.

Appeal from Benton District Court.—HON. L. G. KINNE, Judge.

FILED, MAY 15, 1888.

ACTION against a common carrier for the value of certain property delivered to it for transportation, and which it failed to deliver at its destination. Judgment for plaintiff for the value of the property at the point of destination, as the court found the same to be, less the amount of the freight bill. Defendant appeals.

S. K. Tracy, for appellant.

Traer & Voris, for appellee.

REED, J.—Plaintiff bought the property, which was a lot of fruit trees, at the point of shipment, in this state, paying \$115.89 for it. He had contracted for the sale of it, for a larger amount, at Savannah, Ill.; that being the point of destination. There was no evidence of its value at Savannah, except the agreement of the parties as to the price at which plaintiff had sold it. Defendant did not deny that the measure of plaintiff's damages is the value of the property at the point of destination, less the cost of carriage; but it contended that that value could not be determined from the single transaction in which it was sold. But we think the price at which it was sold affords some evidence of its value at that point. Indeed, in many cases, that would be the only attainable evidence of value. Property of that kind is not handled upon a general market, and it could hardly be said to have a general market value. It can be handled only at certain seasons of the year, and then in limited amounts. A single consignment will frequently fill the whole demand of a locality for that kind of goods; and if, in such case, its value in such locality may not be determined from a single transaction, it could not be determined at all. We have no occasion to inquire whether the same rule could be

Norris v. Kipp.

applicable to the case of property which is handled on the general market; such as grain, cattle and the like. But, as bearing on the question, see *Northern Transp. Co. v. McClary*, 66 Ill. 233. The judgment, we think, should be

AFFIRMED.

NORRIS V. KIPP.

1. **Instructions : REPETITION NOT REQUIRED.** Where the court has given an instruction on its own motion, it is not required to give the same instruction in substance, but in another form, when requested by counsel.
2. ——— : **REFUSAL TO GIVE : ERROR WITHOUT PREJUDICE.** Refusal to give a proper instruction asked is without prejudice, and therefore not reversible error, where it appears from the whole charge that the jury were fairly instructed as to the points involved in the instruction asked.
3. ——— : **BASED ON FALSE ASSUMPTION.** An instruction based on an assumption which the evidence shows to be untrue should not be given.
4. **Sale of Land : BREACH OF ORAL WARRANTY : PLEADINGS AND PROOF.** In an action for the breach of an oral warranty in the sale of land, where the petition alleges that the warranty was a part of the contract of sale, and a part of the consideration of the purchase price, plaintiff may recover upon proving the warranty and a breach of it, without showing that he relied upon it; for in such case the law will presume that he relied upon it.
5. **Appeal : EXCEPTIONS TO INSTRUCTIONS : DEFINITENESS.** An exception to an instruction, filed the day after the verdict was rendered, but which does not specify the part of the charge objected to, nor the ground of the objection, raises no question for review in this court.
6. ——— : **EVIDENCE TO SUSTAIN VERDICT.** A verdict based upon conflicting evidence will not be set aside in this court for want of evidence to sustain it.

Appeal from Montgomery District Court.—HON.
C. F. LOOFBOUROW, Judge

FILED, MAY 15, 1888.

74	444
93	611
74	444
106	454
74	444
120	624
74	444
127	699

ACTION to recover damages for breach of covenants of a deed, and of a verbal warranty in the sale of land. The case was tried to a jury, and verdict and judgment rendered for plaintiff. The defendant appeals.

C. E. Richards and *W. S. Strawn*, for appellant.

J. M. Junkin and *S. McPherson*, for appellee.

ROBINSON, J.—The petition includes three counts. In one the plaintiff alleges that in September, 1885, he purchased of defendant an eighty-acre tract of land in Kansas; that, as an inducement for plaintiff to purchase, the defendant falsely and fraudulently represented to plaintiff that there were on said land two wells of water, a good stone house, and a nice orchard; that in fact there was no well, house nor orchard on said land at the time aforesaid; and that defendant knew such to be the case. In another count, plaintiff alleges that he purchased of defendant the land aforesaid, and that at the time of such purchase, and as a part of the contract of sale, and as a part of the consideration of the price thereof, the defendant represented to plaintiff that said land had thereon, at that time, two good wells of water, a good stone house and a nice orchard of fruit trees, and warranted the same to plaintiff, and agreed by parol to make good any failure of said warranty; that in fact there was no well, house nor orchard on said land when said agreement was made. In the other count of his petition, the plaintiff alleges the purchase of the land aforesaid; the execution of a deed therefor, containing the usual covenants against incumbrances, and of warranty; and avers a breach of the same by reason of a tax sale and delinquent taxes.

I. Appellant complains of the refusal of the court to give the first and third instructions asked by him.

There was no error in this refusal. The substance of these instructions was included in the charge to the jury, and the court was under no obligation to give the same in another form.

1. INSTRUCTIONS: repetition not required.

Norris v. Kipp.

II. The appellant asked the court to instruct the jury that they could not presume fraud, but that the burden was on the plaintiff to establish it by clear and satisfactory proof. This instruction the court refused to give, and the appellant insists that this refusal was erroneous. The charge of the court instructed the jury as to the facts which would constitute fraud in this case, and that the burden of proving them was upon plaintiff. It also instructed them as to facts which would not constitute fraud. An examination of the entire record leads us to conclude that the issue of fraud, and the evidence necessary to establish it, were fairly submitted to the jury, and that appellant was not prejudiced by the refusal of the court to give the instruction in question.

III. Appellant complains of the refusal of the court to instruct the jury that there could be no recovery on the count alleging fraud, if, at the time of the sale, defendant was acting for another, who was the owner of the land, and to whom plaintiff applied for information, if he was influenced by such information in making the purchase. We do not think such an instruction would have been proper in this case. It was shown, and not contradicted, that plaintiff refused to take a deed from the person who owned the land when the negotiations were commenced, and that he insisted upon dealing with the defendant. The latter not only conveyed the land to plaintiff, but he alone received the consideration for the conveyance. The fact that plaintiff caused inquiries to be made of a former owner of the land would not defeat his right of recovery in case the alleged fraud were proven.

IV. The court charged the jury that, to entitle the plaintiff to recover on the warranty as to improvements, it was only necessary for him to show (1) the fact that the warranty was made as claimed; (2) that there was a breach of the warranty. Appellant insists that it was also necessary for plaintiff to show that he relied upon the

8. —: refusal
to give: error
without
prejudice.

8. —: based
on false as-
sumption.

4. SALE of land:
breach of oral
warranty:
pleadings and
proof.

Norris v. Kipp.

statements constituting the warranty. We do not concur in that view. The petition states that the alleged warranty was a part of the contract of sale, and a part of the consideration of the purchase price. If this were true, the law would presume that it was relied upon by plaintiff. Hence, as a conclusion of law, it was not required to be pleaded. If, for any reason, the alleged warranty did not enter into the agreement, or was waived, it was incumbent upon defendant to plead and show the fact. The denial of the answer required the plaintiff to establish the alleged warranty, and that it was a part of the contract of sale, and to prove a breach of its conditions. When this was done, he had shown a *prima-facie* right to recover. *Holbrook v. Burt*, 22 Pick. 552. See, also, *Taylor v. Davis*, 11 Ill. 13.

V. Appellant complains of the fourth paragraph of the charge to the jury, on the ground that it did not state that the warranty as to improvements, exceptions to instructions: definiteness. in order to be effective, must be in writing. The question of the sufficiency of a parol warranty, in the sale of realty conveyed by deed, to sustain an action, was referred to, but not decided, in *Clark v. Ralls*, 50 Iowa, '275. We do not find it necessary to determine that question now. No portion of the charge was excepted to when given. The day after the verdict was rendered the defendant filed exceptions to portions of the charge, including the paragraph in question. Section 2789 of the Code requires the exception so taken to "specify the part of the charge or instruction objected to, and the ground of the objection." The failure of the court to charge the jury that the warranty must be in writing was not made a ground of the objection, nor was it made a ground of the motion for a new trial, nor was the question involved in any manner raised during the trial. So far as is shown by the record, that question is raised for the first time in this court. We think that it is raised too late, and must now be disregarded.

VI. Appellant insists that the verdict is not sustained by the evidence. The evidence was conflicting,

Winter v. The Central Iowa Ry. Co.

6. — : evi-
dence to sus-
tain verdict. and the facts established by it were properly submitted to the jury for determination. We cannot say that their verdict was unauthorized.

VII. Other objections are made and argued by counsel for appellant. Some of them are disposed of by the views we have already expressed. Others relate to immaterial matters. We deem it unnecessary to refer to them in detail, but will say that we have examined them all, and find no prejudicial error in any of the matters of which complaint is made.

AFFIRMED.

74	448
80	327

74	448
107	520

74	448
116	78

74	448
128	729

74	448
142	113

WINTER V. THE CENTRAL IOWA RAILWAY COMPANY.

1. **Evidence: ADMISSION OF: ERROR WITHOUT PREJUDICE.** The erroneous admission of evidence whose only tendency is to establish a fact otherwise fully established, is without prejudice, and no ground for reversal.
2. **Personal Injury: EXTENT OF: EVIDENCE: OPINION.** In an action for damages for a personal injury, it was competent to ask a witness, who had known the plaintiff both before and after the injury, the following question: "What, if anything, did you see in his (plaintiff's) appearance since the accident,—that he was able to work as before, or otherwise?" (Compare *State v. Shelton*, 64 Iowa, 333.)
3. — : — : — : **STATEMENTS OF PLAINTIFF SUBSEQUENT TO INJURY.** In such action, the plaintiff cannot be permitted to prove his own statements as to the extent of his injuries, made long after the accident.
4. — : **DAMAGES: LOSS OF TIME: INSTRUCTIONS WITHOUT EVIDENCE.** In such case, it is error to instruct the jury that if they found that plaintiff was, by his injuries prevented from pursuing his usual business and vocation, he would be entitled to recover reasonable compensation for such loss, when there was no evidence as to the value of his time or services.

Appeal from Cerro Gordo District Court.—HON.
G. W. RUDDICK, Judge.

FILED, MAY 15, 1888.

ACTION for the recovery of damages for a personal injury sustained by plaintiff, as he alleges, while traveling as a passenger on one of defendant's trains, and caused, as he charges, by the negligence of its servants in charge of the train. Verdict and judgment for plaintiff, and defendant appeals.

Anthony C. Daly, for appellant.

Sherwin & Schermerhorn and *H. C. Hemenway*, for appellee.

REED, J.—Plaintiff, at the time of the accident in question, was riding as a passenger in the caboose attached to a freight train. While the train was in motion a coupling broke, and the caboose, and the other cars which were detached, came to a stand-still. The engine and balance of the train had proceeded about two miles when the engineer discovered what had happened. He immediately stopped the train, and commenced backing it towards the standing cars, for the purpose of coupling to them. For some reason, however, he did not have the engine well under control, and when the train struck the standing cars it was moving at quite a high rate of speed. The effect of the collision, as plaintiff claims, was to throw him a distance of eight or ten feet against the conductor's desk, and with such force as to greatly injure his right shoulder. The evidence leaves no doubt that he sustained some degree of injury in the accident, but the extent of his injuries was a disputed question in the case.

I. On the trial plaintiff was permitted, against defendant's objection, to introduce evidence tending to prove certain statements of the conductor and a brakeman employed on the train with reference to the cause of the accident, and the rate of speed at which the engine and cars were running at the time of the collision, and shortly before that. The statements were made soon after the accident

1. EVIDENCE:
admission of:
error without
prejudice.

occurred. It may be conceded that these statements were not admissible. They related, however, to matters concerning which there was no controversy upon the trial. The evidence showed without conflict that the engine and train were moving at a dangerous and unusual rate of speed at the time of the collision; so that defendant could not be prejudiced by the admission of the statements, and the ruling affords it no just ground of exception.

II. A witness, who testified that he had known plaintiff for a number of years, and that he had worked with him both before and after the accident, was asked the following question, to which defendant's counsel objected, but the objection was overruled: "What, if anything, did you see in his appearance since the accident,—that he was able to work as before, or otherwise?" The question called for the opinion of the witness, founded on his observation as to the physical condition of plaintiff after the accident. Under the settled rule on the subject, the question was competent. See *Lawson, Exp. Ev.*, Rule 64; *State v. Shelton*, 64 Iowa, 333.

III. Plaintiff was permitted, against defendant's objection, to introduce evidence of certain statements made by himself long after the accident. The statements were to the effect that he suffered pain from the injury, and that, owing to his injuries, he was not able to perform certain kinds of work. The ruling is erroneous. As stated above, the principal question in controversy between the parties was as to the extent and permanency of plaintiff's injuries. Very clearly a party is not entitled to introduce his own statements and declarations in proof of the very matter in issue when they are not themselves the subject of the action. *Chapin v. Marlborough*, 9 Gray, 244; *Morrissey v. Ingham*, 111 Mass. 63; 2 Whart. Ev. secs. 1100, 1101.

IV. Plaintiff introduced evidence tending to prove that he was disabled by his injuries for several months.

The State v. Farlee.

4. —; damages: loss of time: instructions without evidence.

He also proved his business or vocation. But there was no evidence as to the value of his time or services. The court instructed the jury that if they found him entitled to recover, and further found that "he was by the injuries prevented from pursuing his usual business and vocation, he will be entitled to recover reasonable compensation for such loss." The value of time or services, being susceptible of proof, should not be left to the jury, to be determined at their discretion, or upon their own judgment, but the party seeking to recover therefor should be required to establish his claim by competent evidence. It is true that it is very largely a question of opinion, but it should be determined upon the testimony of witnesses who are found to be competent to express an opinion upon the subject. The uniform holding of this court has been that it is judicial error to submit such questions to the jury, when there is no evidence from which it can be determined. *Reed v. Chicago, R. I. & P. Ry. Co.*, 57 Iowa, 23; *Stafford v. City of Oskaloosa*, 57 Iowa, 748; *White v. Spangler*, 68 Iowa, 222; *Gardner v. Burlington, C. R. & N. Ry. Co.*, 68 Iowa, 558; *Nichols v. Dubuque & D. Ry. Co.*, 68 Iowa, 732.

It is insisted that the verdict in its amount was the result of passion and prejudice, but, as we must reverse the judgment on the grounds pointed out, we will not consider that question. We also deem it unnecessary to consider a number of other questions which relate merely to the conduct of the trial, as they will probably not arise on the retrial of the cause.

REVERSED.

THE STATE V. FARLEE.

1. **Criminal Law: APPEAL FROM JUSTICE'S COURT: RIGHT TO CHANGE PLEA.** One who has, in a justice's court, pleaded guilty to a charge of assault and battery, may, on appeal to the district court, withdraw that plea, and plead guilty of assault only, or not guilty—following cases cited in opinion.

74	451
6123	108
74	451
131	493

The State v. Farlee.

2. **Practice in Supreme Court: DUTY OF COUNSEL TO CITE DECISIONS.** It is the duty of counsel practicing in this court to aid the court by citing former decisions of the court bearing upon their cases, and not to defer such citation until a rehearing is asked.

Appeal from Mills District Court.

FILED, MAY 15, 1888.

THE defendant was convicted upon an information, filed before a justice of the peace, charging him with assault and battery. At the trial before the justice of the peace he pleaded guilty to the charge. In the district court he asked leave to withdraw his plea of guilty, and plead guilty of an assault. This was refused. He then asked leave to withdraw his plea of guilty and plead not guilty. This was not allowed; and judgment was rendered on the plea of guilty. Defendant appeals.

Watkins & Williams, for appellant.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—An opinion was filed in this case at the March term, 1887, in which the judgment of the district court was affirmed. A petition for rehearing was filed by the defendant, which was granted, and the cause is again submitted for our consideration. The arguments in behalf of appellant on the original submission consisted of five printed lines. No authority was cited therein in which it was decided that the defendant had the right to withdraw his plea of guilty, and substitute another plea. In the petition for rehearing, we are cited to three cases in this court which counsel for defendant claim are decisive of the question, and determine that his right to change his plea is absolute. The first case is *State v. Kraft*, 10 Iowa, 330. This case is precisely in point, and holds that the district court erroneously denied the offer to withdraw the plea of guilty, and plead not guilty. That case was followed in

1. CRIMINAL
law: appeal
from justice's
court: right
to change
plea.

The State v. Farlee.

State v. Oehlshlager, 38 Iowa, 297. In the last-named case the attorney general insisted that the case of *State v. Kraft* was wrongly decided, and claimed that it should be overruled, which this court declined to do. As supporting these cases, see, also, *State v. Hale*, 44 Iowa, 96. The statute upon the subject is substantially the same now as it was when the above cited cases were determined. It follows that, whatever our views might be if this were an original question, this judgment must be reversed. It is well understood that we do not disturb rules of practice established by the decisions of this court, especially where they have presumably had the acquiescence of the law-making power, and been followed by this court and the lower courts for a long time. The decision in *State v. Kraft* was made twenty-eight years ago. And we deem it appropriate, in this connection, to say that the idea that counsel in a case are regarded as officers of the court, and that it is their duty to aid the court in the administration of justice, must be regarded as merely chimerical, if we are required to either keep all of the cases in seventy-six volumes of reports constantly in mind, or, without the aid of counsel, make an independent examination to ascertain whether the questions presented have already been determined. Counsel should not defer the citation of authorities until it becomes necessary to file a petition for rehearing.

2. PRACTICE
in supreme
court; duty
of counsel
to cite de-
cisions.

REVERSED.

GALPIN V. GALPIN.

Chattel Mortgage: MADE TO DEFRAUD CREDITORS: ENFORCEMENT: EVIDENCE OF FRAUD IN DEFENSE. Where a chattel mortgage is made without consideration, and solely for the purpose of defeating the creditors of the mortgagor, but ostensibly to secure a promissory note, and the property remains in the hands of the mortgagor, and the mortgagee attempts to enforce the mortgage by taking the property, the mortgagor may plead and show in defense the want of consideration and fraudulent character of the mortgage. Both parties in such case being guilty of the crime defined by section 4074 of the Code, the law will leave them where it finds them, and will not lend its aid to the consummation of the fraud by refusing to hear testimony, showing the fraudulent nature and intent of the transaction, to overcome the *prima-facie* case made by the mortgage itself.

Appeal from Davis District Court.—HON. CHARLES D. LEGGETT, Judge.

FILED, MAY 16, 1888.

ACTION for recovery of specific personal property. Plaintiff claimed the property under a chattel mortgage executed by defendant as security for a promissory note for five hundred dollars. He gave the bond provided by the statute, and the property, which, since the execution of the mortgage, had remained in defendant's possession, was delivered to him by the sheriff under the order issued by the clerk. The defendant answered that the mortgage was without consideration, and was given, at plaintiff's instance and request, for the purpose of defeating the collection of a judgment which one Shopbell had recovered against him (defendant). On the trial, plaintiff introduced in evidence the note and mortgage under which he claimed, and rested. Defendant then offered evidence tending to establish the allegations of his answer, but, on plaintiff's objection, the district court excluded the evidence, and directed

74	454
118	38
74	454
140	103

Galpin v. Galpin.

the jury to find for plaintiff, and subsequently rendered judgment in his favor on the verdict returned in obedience to that direction, and defendant appeals.

S. S. Carruthers, for appellant.

Payne & Eichelberger and *M. H. Jones*, for appellee.

REED, J.—The cases cited by appellee, and relied on as sustaining the ruling of the district court, are of two classes, viz.: (1) Cases in which a party to an unlawful or fraudulent contract, but which has been fully executed, sought to recover the consideration paid by him, and (2) cases in which a party to an executory contract, which, although tainted by fraud in its inception, was still supported by a valuable consideration, sought to defeat its enforcement. The uniform holding of the cases of the first class is, that the party is not entitled to relief. In the other class it has been held that the party will not be permitted to allege or prove the unlawful or fraudulent character of the contract to defeat its enforcement. The present case does not fall within either of those classes. The action is for the enforcement of a right claimed by plaintiff to have accrued to him under the contract. If the mortgage is valid, it conferred upon him the right to the possession of the property; there being no provision in it to the contrary. But possession had not been delivered under it, and the contract, to that extent, was executory, and the action is for its enforcement. While, on its face, the contract imparts a consideration, it was absolutely without consideration; and, because of the fraudulent intent with which it was executed, it was not only contrary to good morals and public policy, but was positively prohibited by law. The statute (Code, sec. 4074) denounces the making of such contracts as criminal, and imposes penalties upon the parties thereto by way of punishment for the act. The parties also are in *pari delicto*.

The question in the case is whether, when one of

Galpin v. Galpin.

the parties to such an agreement seeks the aid of the courts for its enforcement, the other will be permitted to show its real character for the purpose of defeating a recovery. It seems to us that there should be but one answer to that question. The courts will not be made the instruments for the consummation of the fraudulent or criminal purposes of parties. They will not lend their aid for the enforcement of contracts which have been entered into for the single purpose of accomplishing criminal or fraudulent objects, but will leave the parties in the position in which they have placed themselves; and they will do this, not for the purpose of protecting the one party from the consequence of his crime or fraud, but of preventing the other from reaping the fruits of his iniquity. It is to be borne in mind that it is plaintiff who is asking the aid of the court. The matter alleged by defendant, and which he proposed to prove, is purely defensive. It was set up, not as constituting a right in him, or as entitling him to any relief, but in resistance of the right alleged by plaintiff. If the real character of the transaction appeared on the face of the mortgage, there could be no question as to its effect. The courts would not enforce it, even if its enforcement were not resisted; for, as we have said, relief is denied in such cases as a measure of preventive justice. But it was contended that the rule in such cases is that the question must be determined alone from the writing, and that, if it makes a *prima-facie* case for the plaintiff, the defendant should not be permitted to stultify himself by showing the criminal or fraudulent character of the transaction. That such a rule has obtained in cases where the contract sought to be enforced was supported by a valuable consideration, and was not criminal, although alleged to be fraudulent, is true; and in that class of cases it is probably the true rule. But it would be a monstrous absurdity to hold that the law will aid a party to gather the fruits of his evil conduct, while it denounces and punishes the act as a crime. When parties contract in violation of the criminal law, they are not apt to embody the

 Guest v. The Burlington Opera-House Co.

evidence of their guilt in their written agreement ; and, if such contracts are to be defeated at all on the ground of their criminality, it must ordinarily be done upon extrinsic evidence.

We think, therefore, that the court erred in excluding the evidence, and the judgment will be

REVERSED.

74	457
108	835
74	457
129	175

 GUEST V. THE BURLINGTON OPERA-HOUSE COMPANY.

1. **Payment : EVIDENCE : ENTRIES IN CREDITOR'S BOOKS.** The entries in a person's books, showing payment in full of an account to him, are *prima-facie* evidence against him ; but where both he and the one to whom the payment is credited testify that the account has not been paid in full, and the action is against another person, the question of payment should be submitted to the jury.
2. **Agency : CHARGING PRINCIPAL'S DEBT TO AGENT : PRINCIPAL NOT DISCHARGED.** Where one knowingly deals with an agent within the scope of his agency, and makes charges on his books to the agent, instead of to the principal, on account of debts contracted for the principal, he is not thereby precluded from afterwards asserting the claim against the principal.
3. **Estoppel : IN PAIS : WHAT NECESSARY TO CONSTITUTE.** Where a creditor, whose debt arose under a contract with an agent, represented to the principal that the debt had been paid by the agent ; but the principal had already settled with the agent with the understanding that the debt had not been paid, and that the principal would have it to pay, and afterwards paid the agent the amount thus agreed to be due him upon the settlement, *held* that the creditor was not estopped from looking to the principal for the amount of the debt, since the principal did not rely on the representations made by the creditor, and would not sustain any injury by the creditor's being permitted to deny the truth of the representations.
4. **Practice : TAKING CASE FROM JURY : WHEN ADMISSIBLE.** Before the court is warranted in directing a verdict, every fact favorable to the party against whom the verdict is asked, and which the evidence tends to prove, must be conceded.

Appeal from Des Moines District Court. — HON.
CHARLES H. PHELPS, Judge.

FILED, MAY 16, 1888.

ACTION at law to recover the rent of a piano. When the evidence was all introduced, the court directed the jury to find for defendant, and afterwards entered judgment on the verdict returned in obedience to that direction. Plaintiff appeals.

Seerley & Clark, for appellant.

C. L. Poor, for appellee.

REED, J.—Defendant employed George A. Duncan as general manager of an opera-house owned by it, under a contract by which he was to receive as compensation for his services fifteen per cent. of the net proceeds of the business. He contracted with plaintiff for the rent of a piano to be used in the opera-house, the contract being within the scope of his powers as manager, and plaintiff knowing at the time the capacity in which he was acting. After serving in that capacity for some time, he resigned; and a negotiation was entered into between him and defendant's board of directors for a settlement of their accounts. He presented to them a number of bills for expenses incurred in the business, which he represented were unpaid, and among them plaintiff's bill for the rent of the piano. He also claimed \$100.12 for money advanced by him in the payment of expenses, and three hundred and forty dollars paid by him to a clerk who kept the books pertaining to the business, the payment having been made out of the proceeds of the business. The total amount of his claim was \$757.60, of which amount \$647.48 was for the fifteen per cent. of the net proceeds which he was to receive for his services. The directors offered to pay him the amount of his claim, less the three hundred and forty dollars paid the book-keeper. He at first rejected the offer, but after several months concluded to accept it, and so notified the directors, and they paid him the amount. After the offer was made, but before it was accepted or the money paid, some of the directors called on plaintiff with reference to the

 Guest v. The Burlington Opera-House Co.

bill for the rent of the piano, and he represented to them that he made no claim therefor against the company, but that he had charged the amount to Duncan, and that it was paid or settled. He also exhibited to them his ledger, which showed the account for the rent of the piano, together with a number of items for merchandise charged to Duncan. It also showed three items of credit to him, which exceeded by \$80.51 the amount of the account for rent of the piano, and other items charged to him; also the payment of that amount to him in cash to balance the account; and they reported these facts to the board of directors. Duncan was an insurance agent, and the amounts for which plaintiff had given him credit were for the premiums on insurance which he had written for him.

I. It is insisted that the action of the court in directing the verdict for defendant can be sustained on the ground that the evidence shows that plaintiff has been paid the amount of the account by Duncan, and he is, therefore, not entitled to recover as against defendant.

1. PAYMENT:
evidence:
entries in
creditor's
books.

If the question rested alone upon what was shown by plaintiff's ledger, perhaps this position would be correct; for clearly the entries therein are, as against plaintiff, *prima-facie* evidence of payment. But both he and Duncan testified that the account had not, in fact, been paid. On this state of the evidence, plaintiff clearly had the right to have the question of payment, if the case turned on that question, passed upon by the jury, and we deem it proper to say that we do not believe that the district court based its ruling on this ground. If the ruling can be sustained, it must be upon the ground either (1) that plaintiff, by charging the account to Duncan, elected to accept him as the debtor, and is now precluded from claiming the amount from defendant; or (2) that he is now estopped, by his representation that he looked alone to Duncan for payment, and that the debt had been settled or paid, from asserting a claim for the amount against defendant.

 Guest v. The Burlington Opera-House Co.

II. It will be conceded that, when a creditor has the right to look to either one of a number of parties for the payment of his debt, he may, by his election to look alone to one of them, be precluded from afterwards asserting it against the others. We do not, however, determine that this result would follow from the act merely of charging the debt to the one, or from the declaration of the creditor that he looks alone to him for payment; for in the present case it is unnecessary to inquire as to what acts would amount to an election. The relation which existed between the defendant and Duncan was that of principal and agent. The business carried on was the business of defendant, and Duncan was its agent for the management of that business. An agent who, without disclosing the capacity in which he is acting, contracts with reference to the business of his agency, and within the scope of his powers, is personally liable on the contract. The principal, however, is also bound, and the party contracted with may afterwards pursue his remedy against him. But if the capacity in which the agent is acting is known at the time to the other party to the contract, the principal alone is bound by it. These are well-settled principles of the law of agency, and the citation of authorities in their support is unnecessary. When the contract for the rent of the piano was entered into, plaintiff knew that Duncan was general manager for defendant. He knew, also, that the contract had relation to its business. Under the contract between defendant and Duncan, the rental was to be paid out of the gross proceeds of the business. But, under the agreement with plaintiff, his right to payment was not dependent on whether a sufficient amount should be realized from the business to pay him. The rental, when it accrued, was a debt due him for which defendant alone was liable. Duncan was not answerable for it, for, as we have said, he contracted as agent, and the fact of his agency was known. But, to afford a right of election by the creditor, there must be two parties, both of whom are liable for the

2. AGENCY:
 charging prin-
 cipal's debt to
 agent: princ-
 pal not dis-
 charged.

Guest v. The Burlington Opera-House Co.

debt. As but one was primarily liable in this case, it is clear that the right of election did not exist, and the ruling cannot be sustained on this ground.

III. To constitute an estoppel *in pais*, it is essential that the representation or statement relied upon should have been acted upon by the party to whom it was made, and that he will sustain some injury if the one making it be permitted to deny its truth. If a creditor, whose debt arose under a contract made with an agent, represents to the principal that the debt has been paid by the agent, or that he looks alone to him for pay, and the principal thereafter settles with the agent on that assumption, there is probably no doubt that the creditor would be estopped from thereafter asserting the claim against him. In the present case, however, it does not conclusively appear from the evidence that the settlement between defendant and Duncan was made on the assumption either that plaintiff's debt had been paid, or that he looked alone to Duncan for payment; but, on the contrary, there was evidence tending to prove the reverse. Neither does it conclusively appear that defendant will sustain an injury if plaintiff be now permitted to deny the truth of that representation; for, while the money was paid after the representation, the offer to pay that amount was made before that, and was made on the assumption that the rental was then unpaid, and that defendant was liable for it. The amount of plaintiff's bill was not included in the offer; neither was it covered by the payment to Duncan. But the amount offered and paid was fifteen per cent. of the receipts after deducting the expense bills, including the one in question, increased by the amount which he had paid for expenses, and diminished by the amount he had paid the book-keeper. At least, there was evidence tending to prove these facts; and, before, the court is warranted in directing a verdict, every fact favorable to the party against whom the verdict is asked, and which the evidence tends to prove, must be conceded. It is true,

3. ESTOPPEL: in pais: what necessary to constitute.

4. PRACTICE: taking case from jury: when admissible.

 Smith v. James & Have'stock.

some of defendants testified that they paid the money to Duncan in the belief that plaintiff's bill was paid, and would not otherwise have consented to the payment; but this evidence is not necessarily conclusive of the question, and, under the most favorable view for defendant of the evidence, the parties were entitled to go to the jury upon it. We are of the opinion, therefore, that the district court erred in directing the verdict.

REVERSED.

74	469
78	704
74	462
139	222

SMITH *et al.* v. JAMES & HAVERSTOCK.

Will: PROBATE: CONTEST: CONCLUSIVENESS OF JUDGMENT. Since the enactment of chapter eleven, Laws of 1876, giving the right to a trial by jury in cases where the proving of a will is contested, the judgment in such cases is conclusive upon the parties. And in this case, where plaintiffs appeared when the will was offered for probate, and made their contest, and had a full trial, with the right to demand a jury, which they waived, *held* that they cannot now institute an original proceeding, and try again the identical questions which have been adjudicated against them. (*Leighton v. Orr*, 44 Iowa, 680, and *Gilruth v. Gilruth*, 40 Iowa, 848, distinguished).

Appeal from Pottawattamie District Court.—HON. J. P. CONNER, Judge.

FILED, MAY 16, 1888.

THIS is an action to cancel and set aside the last will and testament of Jacob Smith, deceased, upon the ground that said decedent did not have mental capacity to make a will, and because of the alleged fraud and undue influence of the defendants and others. The defendants answered, in substance, that the said will was presented to the circuit court for probate, and that the plaintiffs appeared in said court, and filed written objections thereto, based upon the same grounds as are

Smith v. James & Haverstock.

alleged in the petition in this case; that issue was joined thereon, a jury was waived, and there was a full trial, and the court found against the plaintiffs herein on the issues, and admitted the will to probate. A demurrer to the answer was sustained, and defendants appeal.

Flickenger Bros., for appellants.

No appearance for appellees.

ROTHROCK, J.—The proceedings set up in the answer were a contest of the will under section 2340 of the Code, which is as follows: “After the will is produced and read, a day shall be fixed by the court or clerk for proving the same, which day shall be during a term of court, and may be postponed from time to time, in the discretion of the court. *Whenever the proving of a will is contested, either party shall be entitled to demand a jury, and to the verdict of the jury on the issues involved.*” That part of the section in italics was enacted as an amendment by chapter eleven of the Acts of the Sixteenth General Assembly. Before this amendment was made, the proceedings in relation to contesting wills were prescribed by the original section above quoted, and by section 2353, which provides that “wills admitted to probate, and proven as hereinbefore directed, shall be conclusive as to the due execution thereof until set aside by an original or appellate proceeding.” Before the amendment to section 2340, it was held that an original action could be maintained to set aside the probate of a will where no appearance had been entered or contest made. *Leighton v. Orr*, 44 Iowa, 680; *Gilruth v. Gilruth*, 40 Iowa, 348. In the last-named case, it was said that the original action contemplated by section 2353 is “for the purpose of giving contestants the right of trial by jury.” We think it is quite clear that, as the plaintiffs appeared when the will was offered for probate, and made their contest, and had a full trial, with the right to demand a jury, they cannot now institute an original proceeding or action at law, and again try the identical questions which have

Worsley v. The Burlington Ins. Co.

been fully adjudicated against them. The statute in force since the above amendment was enacted does not authorize two jury trials of the same issues.

We think that, in sustaining the demurrer to the answer, the court erred.

REVERSED.

WORSLEY V. THE BURLINGTON INSURANCE COMPANY.

Settlement : MISTAKE : CORRECTION IN EQUITY : RELIEF UNDER GENERAL PRAYER. Defendant was owing plaintiff's intestate on two separate accounts, one for sums due, and the other for sums not due. In settling the accounts, there was a dispute as to whether certain items which defendant had placed in the second account should not be placed in the first, and they were finally so placed, but they were not deducted from the second account, and defendant, in writing, then agreed to pay the amounts of the two accounts, as they then stood—the one at a time stated, and the other when the several items should come due. Afterwards defendant was sued upon the agreement for the amount agreed to be paid on the first account, and it filed a cross-petition alleging a mutual mistake in the written agreement, in that a credit of a stated sum was erroneously allowed to plaintiff, whereby the amount agreed to be paid on the first account was too large, and asking for a correction of the agreement, and "for such other and further relief as may be in keeping with equity and good conscience." *Held—*

- (1) That the evidence (see opinion) established a mutual mistake, not in the amount agreed to be paid on the first account, but in failing to deduct from the second account the items transferred from it to the first.
- (2) That although defendant in its cross-petition alleged the mistake to be in the first account, and asked relief as to that, yet, under its prayer for general relief, it was entitled to have the agreement reformed, by deducting from the sum agreed to be paid on the second account the sum of the items which had been transferred from it to the first account.

Appeal from Montgomery District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, MAY 16, 1888.

ACTION to recover \$1,064.59 and interest thereon, alleged to be due by the terms of a written agreement. The answer admits the making of the agreement, and that the amount in suit is not paid, but alleges that it

Worsley v. The Burlington Ins. Co.

was included in the amount required to be paid by the agreement in consequence of a mistake of fact, and that plaintiff is not entitled to recover in this action for that reason. The defendant filed with its answer a cross-petition, in which it alleges the making of the agreement set out by plaintiff, and states that by mistake of fact, which occurred when said agreement was made, a credit of \$1,064.59 was erroneously allowed to plaintiff, and included in said agreement. The correction of the instrument is asked, and also general equitable relief. The issues raised by the cross-petition and answer thereto were tried by the district court in the manner provided for the trial of equitable actions, and judgment was rendered in favor of plaintiff for costs. Defendant appeals. The issues raised by the petition of plaintiff and the answer thereto are not involved in this appeal.

Newman & Blake, for appellant.

S. McPherson, for appellee.

ROBINSON, J.—W. H. Hunter was the general agent of defendant for the state of Kansas from August, 1882, to November, 1884. He died in the last-named month, and plaintiff was appointed and qualified as administrator of his estate. When Hunter died his accounts with defendant were unsettled, and the agreement in suit was made, after some controversy, in settlement of these accounts. It appears that they were of two classes, one of which was called the "regular accounts" and the other the "deferred accounts." In the regular account was kept a record of all cash transactions between defendant and decedent, and of all commissions and fees which were to be paid to him prior to the collection of the premium notes on account of which they were due. In the deferred account was kept a record of such commissions and fees as were not to be paid until the premium notes on account of which they were charged should be collected. The agreement in suit was made on the thirteenth day of November, 1885, and fixed the

Worsley v. The Burlington Ins. Co.

balance of the regular account in favor of plaintiff at five thousand dollars, and fixed the balance of the other account in favor of plaintiff at \$8,904.43. The first-named balance was to be paid in full before June 10, 1886, and the other was to be paid at stated times, as collections on certain notes were made. All of the balance on regular account has been paid, excepting the amount in suit.

I. It is claimed by appellant that an entry on its books, made to comply with the ruling of the auditor of state, but which was not designed to affect the accounts of decedent, was by mistake considered in its settlement with plaintiff, and the amount of the balances to his credit was increased in consequence by the sum in controversy. This is denied by appellee, who insists that the settlement was a compromise of matters in dispute, and not the result of an accurate computation of accounts shown by the books of the parties in interest. There is some conflict in the evidence as to some of the issues, but we think the fact is fairly established that a mistake was made in the settlement; that it was mutual; and that it resulted in the increase of the credits specified in the agreement by the amount named in the cross-petition. There does not seem to have been any controversy between the parties to the agreement as to the aggregate amount of the credits in favor of plaintiff. The books of the decedent show that at the date of settlement the amount aforesaid was \$13,021.05, while the books of defendant show that at that date the said amount was \$12,982.31. The chief controversy between the parties was as to the proper balance of the regular account. The plaintiff insisted that a considerable portion of the credits given decedent in the deferred account should be given in the regular account. He states that he never figured on the deferred account, and made no statement to the defendant as to what he claimed on that, and that his purpose in examining the accounts prior to the settlement was to determine what items belonged in the regular account. He states that "the only question in dispute had been as to the amount of the regular

Worsley v. The Burlington Ins. Co.

accounts." He had claimed that it was much larger than the amount admitted by defendant. It was finally agreed that a discount of \$142.47 should be allowed to defendant, and that the balance to the credit of plaintiff in the regular account should be fixed at five thousand dollars. This was larger than the balance on this account shown by the books of defendant by the amount in controversy, and was carried into the agreement of settlement. Notwithstanding this change in the regular account, no change was made in the other, but the balance which the books of defendant showed to be to the credit of plaintiff therein was carried into the agreement. In this a mistake was made, for the reason that such balance should have been reduced by the amount which was added to the balance of the regular account. Our conclusion that a mistake was made by both parties is strengthened by the fact that, six days after the agreement was signed, the defendant wrote to plaintiff and claimed that an error in settlement had been made to the amount in controversy. Two days later the plaintiff answered the letter of defendant, stating that he knew nothing about defendant's books; that he based his views on what Hunter's books showed; and that, when they arrived at an amount which corresponded with them, he was satisfied with it. But the settlement allowed to plaintiff more than one thousand dollars in excess of the amounts to which he was shown to be entitled by Hunter's books. We conclude that a mistake has been established, and that defendant is entitled to have the agreement in suit corrected to carry into effect the intent of the parties to it.

II. Appellee insists that if the agreement is found to be correct as to the balance of the regular account, no relief can be granted to appellant, for the reason that it has not in terms asked any as to the other balance. We do not think this claim is well founded. The defendant alleges that an erroneous credit has been given to plaintiff. It is true that the error is alleged to have occurred in the regular account, and relief as to that is asked; but defendant also asks "for such other and

Douglas, Stuart & Forrest v. Smith.

further relief as may be in keeping with equity and good conscience." The evidence shows that there was a mutual mistake of fact in the settlement as to the amount of credits to which plaintiff was entitled; that the credit he received was too large by the sum in controversy; and that defendant is entitled to relief. We think the averments of the cross-petition and the prayer for relief are sufficiently broad to permit the reforming of the agreement in suit to express the real intent of the parties. The balance in the deferred account to the credit of plaintiff named in said agreement is therefore reduced to \$7,839.84, which sum is to be paid according to the terms of said agreement which relate to the balance in the deferred account.

REVERSED.

74	468
133	287

DOUGLAS, STUART & FORREST V. SMITH.

1. **Chattel Mortgage: ON CRIBS OF CORN TO SECURE ADVANCES: CONSTRUCTION.** I. & M. were grain buyers at country towns, and bought and cribbed large quantities of corn with money advanced by D., S. & F., who were commission merchants in Chicago. As soon as a crib was filled, they would make to D., S. & F. a "crib receipt," or chattel mortgage, on the corn in that crib. Each of these "receipts" conveyed the corn, and provided as follows: "And, in further consideration of the advances made and to be made by said D., S. & F. for our account, we further agree, upon the request of D., S. & F., to procure said corn to be shelled and shipped to them, or their order, as they may direct, at our expense. * * * Said D., S. & F. to sell said corn, and, from proceeds of sale, pay freight, inspection, insurance, their advances on said corn, with interest at eight per cent. on the same, and upon margins upon contracts that may be made for its sale, and commissions of not less than one-half cent per bushel for selling, and account to us for balance of proceeds, if any. The conditions of this sale and transfer are such that, should the undersigned cause to be paid to the said D., S. & F., on or before the fifteenth day of June, 1881, all moneys and accounts due by the undersigned to the said D., S. & F., with interest * * * including commissions * * * on the above-described corn, and on other grain which we have agreed to consign to D., S. & F., or pay commissions on, then this sale and transfer shall be void." *Held—*

Douglas, Stuart & Forrest v. Smith.

- (1) That these receipts were not given merely as security for the money advanced to buy the corn in the particular crib described in the receipt, but that they were issued in pursuance of the general enterprise, which was to buy one hundred thousand bushels of corn, and sell it on the market; and each crib receipt was security for all advances made by the plaintiff, including margins advanced upon sales for future delivery.
 - (2) That the word "due" in the writing was not to be taken in its technical sense, but that I. & M. were liable to all indebtedness to plaintiffs, which they in good faith incurred in carrying out their part of the enterprise, whether due on the fifteenth of June, or afterwards; and that such indebtedness covered any proper outlay made necessary thereafter to protect them, or I. & M., from any legal contracts made for the sale of the corn.
2. **Gambling Contracts: SALES OF CORN FOR FUTURE DELIVERY.** Where country grain buyers had a large quantity of corn in cribs, and they made sales from time to time, through Chicago commission merchants, for future delivery, of No. 2 corn, but, fearing that their corn would not grade No. 2, and hoping that it would improve with age, they bought in and resold, intending to deliver the corn to cover their sales, *held* that the transactions were not illegal, so as to defeat their brokers in the collection of margins advanced for them.

Appeal from Cedar Circuit Court.

FILED, MAY 17, 1888.

THIS is an action of replevin to recover possession of about ten thousand bushels of corn, which, at the commencement of the suit, was stored in three cribs at Garrison, in Benton county. The plaintiffs claim the right to said corn by reason of certain crib receipts or chattel mortgages upon the same, made by Ingersoll & Moulton, dealers in grain. The defendant was sheriff of Benton county, and levied attachments on the corn at the suits of certain creditors of Ingersoll & Moulton. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiffs appeal.

Mills & Keeler, for appellants.

Nichols & Burnham and *Boies, Husted & Boies*, for appellee.

ROTHROCK, J.—I. The plaintiff is a corporation organized under the laws of Iowa, and having its principal office at the city of Cedar Rapids. In 1880 and 1881, the corporation owned and operated mills, and was engaged in the manufacture of oat-meal at Cedar Rapids and Chicago. In connection with this business, they also carried on a commission business on the Chicago Board of Trade in 1880 and 1881. The partnership of Ingersoll & Moulton was engaged in buying grain at Laporte, in Black Hawk county, and other towns in that neighborhood. They bought grain quite extensively at Laporte, Washburn, Mount Auburn and Garrison. Their purchases included large quantities of ear-corn, which they cribbed, shelled and shipped to Chicago, and other markets. In the latter part of October, 1880, they made an arrangement with the plaintiffs at Cedar Rapids, by which the plaintiffs undertook to furnish Ingersoll & Moulton with money to enable them to buy and crib one hundred thousand bushels of corn. It was not expected by the parties that the corn would be shelled and shipped as it was bought, but that it should be cribbed, and held during the winter, and marketed in the spring. Under this arrangement, Ingersoll & Moulton bought and cribbed from one hundred to one hundred and ten thousand bushels of corn during the fall and winter after the contract was made. Ingersoll & Moulton were not mere adventurers. They had been for some time engaged in the same business, and had some capital of their own, but not sufficient to carry on the business without credit, or the benefit of advances of money to pay for the corn as it was bought from the farmers of the country. To secure the plaintiffs for the money advanced to buy the corn, it was agreed that, as each crib was filled, Ingersoll & Moulton should make and deliver to the plaintiffs crib receipts or chattel mortgages upon the corn in the crib. As the form of these instruments presents an important question in the case, we will here give a copy of one of them:

1. CHATTEL
mortgage:
on cribs of
corn to se-
cure ad-
vances:
construction.

Douglas, Stuart & Forrest v. Smith.

“ Laporte City, Iowa, December 15, 1880.

“ For and in consideration of money advances made to Ingersoll & Moulton by Douglas, Stuart & Forrest, of Chicago, Ill., the receipt of which is hereby acknowledged, we do by these presents sell and convey to the said Douglas, Stuart & Forrest all our right, title and interest in seven thousand bushels of good sound ear-corn, stored in good covered crib, numbered four (4), and located on lots five, six and seven, block eleven, belonging to Burlington, Cedar Rapids & Northern Railway Company, and situated in the town of Garrison, county of Benton, state of Iowa; the said corn being at the time of this sale and transfer the property of the undersigned, and the same being free from all claims or incumbrances. And, in further consideration of the advances made and to be made by said Douglas, Stuart & Forrest for our account, we further agree, upon the request of Douglas, Stuart & Forrest, to procure said corn to be shelled and shipped to them, or their order, as they may direct, at our cost and expense, and until such shipment will keep said corn insured against loss by fire for the sum of two thousand dollars; loss, if any, payable to Douglas, Stuart & Forrest, as their interest may appear. Said Douglas, Stuart & Forrest to sell said corn, and from proceeds of sale pay freight, inspection, insurance, their advances on said corn, with interest at eight per cent. on the same, and on margins upon contracts that may be made for its sale, and commissions of not less than one-half cent per bushel for selling, and account to us for balance of proceeds, if any. The conditions of this sale and transfer are such that, should the undersigned cause to be paid to the said Douglas, Stuart & Forrest, on or before the fifteenth of June, 1881, all moneys and accounts due by the undersigned to the said Douglas, Stuart & Forrest, with interest on the same at the rate of eight per centum per annum, including commissions of one-half cent per bushel on the above-described corn, and on other grain which we have agreed to consign said Douglas, Stuart

Douglas, Stuart & Forrest v. Smith.

& Forrest, or pay commissions on, then this sale and transfer shall be void.

“C. T. INGERSOLL,
“G. F. MOULTON.”

These receipts and mortgages were duly acknowledged and recorded. At the time of entering into the arrangement, Ingersoll & Moulton had some corn in crib, and they ordered the plaintiffs, as their brokers, to sell for them, on the Board of Trade in Chicago, corn for delivery in May and June following. These sales were made from time to time, during the fall and winter, and upon their face would appear to be for a much larger amount of corn than Ingersoll & Moulton would have to deliver in fulfillment of their contracts of sale made through the plaintiffs; but, although these figures look large, it appears that many of the transactions amounted merely to extensions of the time of delivery of the corn actually contracted to be sold. In other words, at the request of Ingersoll & Moulton, their contracts were changed over so as to be performed at a later date. This was done by buying in on the Board of Trade and selling out again. These extensions of time were sometimes attended with a profit, and at other times loss, to Ingersoll & Moulton. They appear to have been made necessary by the fact that they apprehended that their corn would not grade No. 2, and this apprehension afterwards proved to be well founded as to a greater part of it. The result was that Ingersoll & Moulton became in debt to the plaintiffs and others; and on the eleventh day of November, 1881, George F. Moulton, one of the members of said partnership, went to Cedar Rapids for the purpose of informing the plaintiffs of the condition of the affairs of the firm, so that they might protect themselves. The result of this interview was that on the next day the plaintiffs took actual possession of the corn in controversy; it being in certain cribs at Garrison, in Benton county, and on which they held three crib receipts or chattel mortgages, a copy of one of which we have above set out. Two days afterwards, the defendant, who is sheriff

Douglas, Stuart & Forrest v. Smith.

of Benton county, levied attachments on the corn at the suit of other creditors of Ingersoll & Moulton. The plaintiffs replevied the corn from the sheriff. No question is made as to the validity of the debts upon which the attachments issued. A short time after the suit was commenced, the parties entered into a stipulation by which the corn was shelled, shipped and sold; and the contest at the trial involved the rights of the parties to the proceeds arising from the sale. We have not thought it necessary to set out the pleadings upon which the cause was tried. They are quite voluminous; but, as is usual in the trial of causes, as the trial proceeded, the rights of the parties upon the merits of the controversy turn upon a few well-defined and pivotal questions. Upon the face of these crib receipts, and in view of the fact that the plaintiffs were in open and notorious possession of the corn before and at the time the attachments were levied, it would appear that, the receipts or mortgages not having been taken up, the plaintiffs were entitled to hold the corn until the receipts were paid. The defendant claims (1) that nothing was due on these receipts or mortgages, but that they were fully paid and satisfied before the suit was commenced; (2) that the real indebtedness to the plaintiffs is founded upon certain gambling transactions upon the Chicago Board of Trade, and are therefore not the subject of any valid claim against Ingersoll & Moulton. We do not deem it necessary to state any other questions, because, as we think, the rights of the parties depend upon the determination of those above stated, without more.

Upon the question as to whether there was anything due upon the receipts, the defendant relies upon a statement of account made by the plaintiffs to Ingersoll & Moulton on the first day of July, 1881, by which it appeared that there was \$14,031 due to the plaintiffs. It is conceded that, after this date, plaintiffs received from Ingersoll & Moulton the sum of \$15,925.06, and defendant claims that this amount was, by the direction of Ingersoll & Moulton, to be applied in payment of

Douglas, Stuart & Forrest v. Smith.

the crib receipts or mortgages. Upon the face of it, this appears to be payment in full, and we think the jury was by this statement of account induced to return a verdict, which, when tested by the other evidence in the case, and a proper construction of the crib receipts, was wholly without the support of any evidence. It is important to determine what species of indebtedness these receipts and mortgages were intended to and did secure. Counsel have argued this question elaborately; and, without following the arguments, we will briefly state what we believe to be their true construction. They recite that Douglas, Stuart & Forrest shall, from the proceeds of the sale of the corn, "pay freight, inspection, insurance, their advances on said corn, with interest on the same at eight per cent., and on margins upon contracts that may be made for its sale, and commissions of not less than one-half cent per bushel for selling." The condition of the mortgage is that if the mortgagors shall pay to plaintiffs, "on or before the fifteenth day of June, 1881, all moneys and accounts due, * * * with interest on the same at the rate of eight per cent. per annum, including commissions of one-half cent per bushel *on the above-described corn, and on other grain which we have agreed to consign to said Douglas, Stuart & Forrest,* or pay commissions on, then this sale and transfer shall be void." It is plain from the last clause, which we have italicised, that these receipts were not merely given as security for the money advanced to buy the corn in the particular crib described in the receipt. All of the receipts were issued in pursuance of one general enterprise, which was to buy one hundred thousand bushels of corn, and sell it on the market, and each crib receipt was security for all advances made by the plaintiffs; and these advances included margins advanced upon sales to be for future delivery. This is a most significant provision of the contract, when taken in connection with the acts of the parties from the very inception of the enterprise until its disastrous termination. On the very day that the arrangement was made

for the advances, Ingersoll & Moulton ordered a sale of corn for delivery in May following; and, as we have stated, they continued to make such orders, and extended the time of delivery, from time to time, sometimes at an advantage and sometimes at a loss. The court instructed the jury that the crib receipts secured only such "moneys and accounts as were due and unpaid on the fifteenth of June, 1881, and except advances which might be made or were made, either before or after said date, by plaintiffs on contracts made for the sale of the corn which was covered by said crib receipts." This instruction was, we think, erroneous and misleading, in making any allusion to moneys and accounts due on the fifteenth of June. The error consists in construing the receipt as meaning that the money must be actually due; that is, payable on or before that day. In view of the evidence in the case, this was wrong. It appears, without conflict or dispute in the evidence, that the whole amount of the indebtedness was extended, by the act of the parties, beyond the fifteenth of June; and, of course, the extension of the debt carried with it an extension of the security or mortgage. And we think this and other instructions given by the court to the jury did not properly define the meaning of the contracts made for the sale of the corn covered by the crib receipts. It would appear from this instruction, or the jury might well have been led thereby to believe, that the sales for which margins might be required, as provided in the receipts, were contracts in which the plaintiffs sold for Ingersoll & Moulton a crib of corn at Garrison, Benton county, or at any of the other places that the corn might be located.

And, in this connection, we will allude to a special interrogatory submitted by the court to the jury, which is vulnerable to the same objection. It is as follows: "Were the contracts of sales, in lots of five thousand bushels or upwards, which plaintiffs claim to have made on account of Ingersoll & Moulton on the Board of Trade of Chicago, and upon which they claim to have

Douglas, Stuart & Forrest v. Smith.

paid losses, contracts for the sale of the same corn upon which Ingersoll & Moulton issued crib receipts to plaintiffs? A. No.” The jury could, of course, answer this question in the negative, and would be led thereby to find a general verdict for the defendant. The vice of the instruction and interrogatory is in confining the jury to the identity of the corn in the cribs. As we shall presently see, the validity of the sale did not depend upon the question of the identity of the corn. But to return to the question of payment: The court should have instructed the jury that the word “due” was not to be taken in its technical sense, and that Ingersoll & Moulton were liable for all indebtedness to the plaintiffs which they in good faith incurred in carrying out their part of the enterprise, whether due on the fifteenth of June or afterwards, and that such indebtedness would cover any proper outlay made necessary thereafter to protect them or Ingersoll & Moulton from any legal contracts made for the sale of the corn. All of the evidence, without conflict, shows that this is the way the parties themselves construed the contract. Moulton in his testimony claims that he turned this corn over to the plaintiffs upon these receipts; and, about the time this suit was commenced, Ingersoll wrote a letter to the plaintiffs, in which he stated that “about one-half of the corn at Garrison is in cribs, over which you still hold certificates. We suppose you will have to replevy to assert your claim, and this will go pretty well towards paying your claim. We deeply regret this turn in affairs. It leaves us flat. This resulted from (1) bad weather preventing our getting out the corn when it should have gone to the market; (2) the losses on short sales, and in other ways. We have realized for a month that it would be difficult for us to get out whole; but, looking for fair weather, we hoped to get our corn out, pay you, and arrange for balance. The fearful weather has prevented this, until our creditors became impatient and gobbled us.”

II. The only other question we deem it necessary to determine is whether the sales of corn made by plaintiffs

Douglas, Stuart & Forrest v. Smith.

2. GAMBLING
contracts:
sales of corn
for future
delivery.

as brokers in behalf of Ingersoll & Moulton were gambling contracts within the meaning of the law. The plaintiffs contend that there was no evidence justifying the finding that the contracts were of that character. In determining a question of this kind, much importance is always attached to the circumstances surrounding the parties. It is conceded that Ingersoll & Moulton had a large amount of corn for sale. It was not in a condition for immediate delivery. They ordered the plaintiffs to make sales for them from time to time, and to extend the time of delivery, which, as we have seen, was done by buying in and selling out, and gave the appearance of selling more corn than Ingersoll & Moulton had or expected to have. But they pursued the very course which all country grain dealers do in buying corn in the fall and winter. They sold for future delivery. All of their correspondence with the plaintiffs shows this to be the fact. It is true that Ingersoll states, in his testimony as a witness, that he did not intend to deliver the corn in the cribs to fill these contracts; but his testimony is entitled to no consideration, because his own correspondence with plaintiffs shows that he did intend to ship the corn to cover the contracts. And, then, his declaration of his intention may have been literally true, and still not a material fact in the case, because it was evidently founded upon the idea that it was not the intention to deliver the identical corn in the cribs. As we have seen, this is not the proper test to be applied to transactions of this kind. It would be foolish to suppose that either of the parties to such a sale intended that Ingersoll & Moulton would shell this corn, put it in the cars, ship it to Chicago, and that the plaintiffs, as their commission men, would call on the purchaser, and measure the corn out to him. Everybody knows that the vast grain transactions of this country could never be conducted in that way. Warehouse and elevator receipts have come to be the evidence of title to the property which they represent, and men do business according to the known usages of trade. Besides, a

Douglas, Stuart & Forrest v. Smith.

man may make a lawful contract for the sale of property for future delivery without being the owner of the property sold at the time of the contract. He may go into the market, purchase the property, and perform his contract. Ingersoll & Moulton were not mere novices or gamblers on the Board of Trade. The evidence shows beyond controversy that they intended to deliver the corn in their cribs, to cover the sales which they ordered the plaintiffs to make for them. The only obstacle in the way was that the corn would not grade up to the contracts which plaintiffs made for them, and this was the cause of changing the contracts so as to make the delivery come later in the summer. They hoped that the corn might, as the season advanced, improve in quality; but the fact that the property they had did not meet the requirements of their contract did not render the contract void. "A dealer has a clear right to sell, and agree to deliver at some future time, that which he then has not, but expects to go into the market and buy; and it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time; and that there need not be an actual manual possession given, but a symbolical one, as by delivery of warehouse receipts according to custom, is also beyond dispute." *Gregory v. Wendell*, 39 Mich. 340; *Logan v. Musick*, 81 Ill. 419. This case presents no such facts as this court has heretofore held to be sufficient to authorize a finding that alleged sales were gambling transactions. In *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41, the evidence was plain and undisputed that the defendant did not intend to deliver any property, nor any warehouse or elevator receipts. It knew, and its brokers knew, that it did not have the ability to do so. In the case at bar, the property sold was not only such as the sellers had the financial ability to buy, but it was in the very line of their business to sell corn, and they actually had on hand large quantities for sale. And we think that the theory upon which

In re Will of Murfield.

the case was tried, the constant reference to the identical corn in the cribs, was all wrong. The whole correspondence between the parties shows that the corn in the cribs was held to cover and protect the contracts, and this was sufficient, no matter how it was disposed of. We conclude that there was no evidence upon which to find a verdict that these contracts were illegal.

III. There are other questions discussed by counsel which we do not deem it necessary to determine. So far as they relate to rulings of the court upon the admission and exclusion of evidence, we discover no error. The plaintiffs claim that the corn was turned over to them by Moulton, not only to cover the receipts, but to include all of the indebtedness arising out of all the contracts. We think the court properly instructed the jury on this feature of the case; and, as there was a conflict in the evidence touching the question, we would not feel at liberty to disturb the verdict upon that ground.

For the errors above pointed out, the judgment will be

REVERSED.

In re WILL OF MURFIELD.

WILLS : PROBATE : ONLY ONE WITNESS : TWO WITNESSES TO CODICIL.

The will offered for probate in this case was attested in due form by two witnesses, but one of them was incompetent. A codicil was afterwards added on the same sheet of paper, which referred to the will, and stated that it was to be taken as a part thereof; and the codicil was duly attested by two competent witnesses. *Held* that the due execution and proof of the codicil met all the requirements of the statute as to the original will, and that both must be considered as one instrument.

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, MAY 17, 1888.

THE will of J. S. Murfield, deceased, was duly offered for probate by the executor of his estate and

In re Will of Murfield.

others. Hattie A. Miller, a daughter of decedent, contested the probate of the will, and filed objections thereto. These were overruled, and the will admitted to probate. Hattie A. Miller appeals.

• *Jamison & Mellett*, for appellant.

Sheean & McCarn, for appellees.

ROBINSON, J.—The instrument in controversy consists of two parts. The first is in form a will, signed on the twenty-second day of April, 1886, by the testator, and attested by E. V. Miller and John B. Murfield. The second is a codicil, written on the same sheet of paper as the first, signed by the testator on the thirtieth day of September, 1886, and duly attested. It is conceded that John B. Murfield, who was a subscribing witness to the first part, is named therein as a beneficiary, and that he was not offered as a witness to prove its execution. The entire instrument was admitted to probate on the testimony of E. V. Miller and the two witnesses to the codicil; Miller alone testifying as to the execution of the first part. No objection is made as to the execution and proof of the codicil, but it is insisted by appellant that the first part, which we may term the original will for convenience, was not attested and proven by two disinterested witnesses as required by law, and hence that it should not have been admitted to probate.

The real question for us to determine is whether the execution of the codicil gave force and effect to the original will. We think it did. The first or introductory part of the codicil is as follows: "Whereas, I, J. S. Murfield, did, on the twenty-second day of April, eighteen hundred and eighty-six, my last will and testament, I do now, by this writing, add this codicil to my said last will, to be taken as a part thereof." A word indicating the execution of the will is evidently omitted after the date, but there can be no mistaking the intent of the language used. The codicil is added to the instrument, which appears on the same sheet of paper. It is identified by the fact that it so appears by its date,

In re Will of Murfield.

and by references in the body of the codicil to its provisions. A codicil is part of the original will to which it refers, and the two together constitute but a single instrument. In this case there can be no doubt that the testator designed the original will and the codicil to be construed together in ascertaining the testamentary intent. This being true, we think the due execution and proof of the codicil met all the requirements of the statute as to the original will, and that both must be considered as one instrument. Our conclusion is fully sustained by the case of *Newton v. Seamen's Friend Society*, 130 Mass. 91. In that case a codicil contained the following language: "I revoke that part of my will which gives directions for the payment of my legacies, and order and direct my executors, or the survivor of them, to pay the several legacies mentioned in my will and codicil as near as possibly convenient according to the directions written in a book by Melvin W. Pierce, signed by me and witnessed by said Pierce." The book was in existence at the time of the making of the codicil, and contained several pages of instructions as to the paying of legacies. It was held that the language quoted made the book a part of the will. "There is no doubt that a valid bequest or devise may be made by reference to objects and documents not incorporated in or annexed to the will." *Loring v. Sumner*, 23 Pick. 102. "A testator may refer expressly to a paper already executed, and describe it with such particularity as to incorporate it virtually into the will, or he may refer to deeds or other instruments or monuments, as existing facts to which reference may be had in construing his will." *Thayer v. Wellington*, 9 Allen, 292. See, also, *Hopkins v. Holt*, 9 Wis. 230; *Murphy v. Black*, 41 Iowa, 488; *Greve v. Camery*, 69 Iowa, 223; *Jackson v. Babcock*, 12 Johns. 394; *Chambers v. McDaniel*, 6 Ired. 229; *Harvy v. Chouteau*, 14 Mo. 592. We discover no error in the ruling of the district court. The case is therefore

AFFIRMED.

ANDERSON V. PETERSON *et al.*

Boundaries: ESTABLISHING LOST CORNER: EVIDENCE. Where the original monument which marked a corner has been obliterated, and its relocation is attempted by measurements from other corners, the most that can be said of the work, in any case, is that it is approximate. And upon consideration of the evidence in this case (see opinion), the report of the majority of the commission to locate the lost corner is approved, though the measurements on which the minority report is based correspond with the field-notes of the original survey.

Appeal from Webster District Court.—HON. D. D. MIRACLE, Judge.

FILED, MAY 17, 1888.

THIS is a proceeding under chapter eight, Laws 1874, to establish a corner and boundary line. The district court appointed a commission, consisting of three surveyors, to make the survey. Two of the commissioners united in a report that the corner should be established at a certain designated point. The other commissioner reported that, in his judgment, the true location of the corner was some distance east of the point designated by the majority. The district court approved the report of the majority, and entered judgment in accordance with their recommendation, and, this being adverse to plaintiff, he appeals.

Wright & Farrell, for appellant.

A. E. Clark, for appellees.

REED, J.—The corner in question is the quarter-section corner on the south line of section fourteen, in township eighty-seven, range twenty-nine, and the disputed line is that dividing the southwest and southeast

quarters of that section. The different results reached by the commissioners arise from a difference of opinion as to the manner in which the survey should be made. The southwest corner of section fourteen, being the common corner of that and sections fifteen, twenty-two and twenty-three, is also lost, and it is conceded by both parties that the true location of the lost quarter corner in question can be determined only by first determining the location of that corner, and their difference is as to the manner in which that should be done. The monument erected at the southeast corner of section fourteen, being also the northeast corner of section twenty-three in the original survey, is plainly discernible; as are also the quarter corners between sections twenty-two and twenty-three, fourteen and fifteen, and fifteen and twenty-two, on the south line of fourteen. So that we have original corners one-half mile south, north and west, and one mile east, of the section corner, the location of which is to be determined. Each of the surveys locates the corner equidistant from the quarter corners north and south of it. The result reached by the minority of the commission was arrived at by measuring from the quarter corner between sections fifteen and twenty-two to the southeast corner of section fourteen, a distance of one mile and a half, and subdividing the line. The total length of the line, as shown by that measurement, corresponds with its length as shown by the field-notes of the original survey. The distance from the quarter corner west to the disputed section corner, as shown by the field-notes, is forty chains seventeen links, and the length of the south line of section fourteen is eighty chains twenty-two links, and the minority report locates the corner forty chains seventeen links east of the quarter corner west of it, and by it the quarter corner in dispute is located midway between the point thus fixed and the southeast corner of the section. The majority of the commission ran a right line from the quarter corner between sections twenty-two and twenty-three to that between sections fourteen and fifteen, and their report fixes the point of intersection of that line

Anderson v. Peterson.

with the east and west line, as run by the other survey, as the location of the lost section corner, and it locates the quarter corner in dispute midway on the line between that point and the southeast corner of section fourteen. Perhaps it can be said that neither of the theories contended for leads with absolute certainty to the result desired. Indeed, it may be said that absolute certainty is not attainable in such cases. When the monument which marked a corner has been obliterated, and its relocation is attempted by measurements from other corners, the most that can be said of the work, in any case, is that it is approximately correct. The measurements are made under circumstances different from those attending the original survey, and by different parties. The lines are traced with different instruments, and changes may have occurred in the magnetic meridian. No rule can be laid down as applicable to every case, but the question in each case must be determined from the best evidence attainable in the case. The circumstance of the correspondence of the measurement made by the minority of the commission with the field-notes of the original survey strongly supports their theory, but it is by no means conclusive.

It is conceded that the lost section corner is situated in a marsh, and the ground is such that the measurement of the line was very difficult. The correspondence may therefore have been accidental, and, if so, the measurement affords no reliable basis for determining the question; and, when all the facts of the case are considered, we think the other theory is supported by the better evidence. The northeast quarter of section fourteen has been in cultivation for many years. The owner of the tract was examined as a witness by the commissioners, and the substance of his testimony is embodied in the majority report. He testified that before making his improvements he sought to locate the center of the section, that being the southwest corner of his land. At that time, all of the quarter corners of the section were visible; and he proceeded by staking the lines from the east to the west quarter corner, and from the north to

Anderson v. Peterson

the south corner, the latter being the one in dispute, and adopted the point of intersection as the center of the section, and made his improvements accordingly. As he did the work without the aid of an instrument, it cannot be said to be absolutely correct; but, as the monuments were all visible, the work, if carefully done, would be approximately so. His west line, as thus established, is now clearly defined, and, when prolonged to the south line of the section, intersects it at the point adopted by the majority as the location of the corner. Another circumstance favorable to that theory, and in conflict with the other, is that a right line from the quarter corner between sections twenty-two and twenty-three cuts the point adopted as the true location of the lost section corner, while, if the point adopted by the minority is taken, there is a perceptible angle in the north and south line at that point. Now, while the line between sections twenty-two and twenty-three and that between fourteen and fifteen are, to some extent, independent of each other, and not necessarily on the same variation, there is no apparent necessity for changing the variation at that corner. The line from it to the section corner east was but twenty-two links too long, while the regulations of the department allow a latitude of not more than one hundred links in the east and west section lines. See Zab. Land Laws, 536. But, if any change was made in the variation at that point, we would naturally expect it to be to the east, as that would have the effect to shorten the line running east from the next section corner north; whereas, if the point found by the minority be adopted, it is to the west, and necessarily has the effect to lengthen that line.

If the case should be regarded here as a law action, the judgment is abundantly sustained; and, if we regard it as triable *de novo* in this court, we reach the same conclusion.

AFFIRMED.

Judge v. Kahl.

JUDGE V. KAHL *et al.*

Intoxicating Liquors: ENJOINING NUISANCE: REMOVAL OF PLAINTIFF FROM COUNTY. An action to enjoin as a nuisance the sale of intoxicating liquors can be begun only by a citizen of the county where the nuisance exists, but his right to prosecute it to judgment does not cease upon his removal from the county.

Appeal from Clinton District Court.—HON. W. F. BRANNAN, Judge.

FILED, MAY 18, 1888.

ACTION in equity to enjoin the defendants from maintaining a nuisance. Plaintiff was a citizen of the county when the suit was instituted, but afterwards removed to another county in the state. The defendants then moved the court to vacate the temporary injunction, on the ground that plaintiff, not then being a citizen of the county, was not entitled to maintain the action; it having been brought under chapter sixty-six, Acts Twenty-first General Assembly. The district court sustained the motion, and plaintiff appeals from that order.

J. S. Darling, for appellant.

Walter I. Hayes and *A. L. Schuyler*, for appellees.

REED, J.—The statute provides that any citizen of the county may institute and maintain an action of this character in his own name. Chapter 66, Acts 21st Gen. Assem. sec. 1. In *Applegate v. Winebrenner*, 66 Iowa, 67, we held that the action could not be maintained by a person not a citizen or resident of the county where it was instituted. Under the language of the statute, the right, *i. e.*, the right to institute the suit, is clearly dependent on the residence or citizenship of the party in the county; but we are of the opinion that when that right has attached, and the suit has been instituted,

Hart v. Hart.

the right to prosecute it to judgment does not terminate by the removal of the party to another county. The language of the statute is that "nothing in this section shall prevent any citizen of a county from instituting and maintaining in his own name an action," etc. It may be said that two rights are conferred by this language, viz., the right to institute the suit in his own name, and the right to prosecute to judgment; and that both are dependent on the citizenship of the party in the county. But it is his citizenship when the suit is instituted that is referred to, and it is upon that fact that both rights depend. This is the fair import of the words made use of, and there is nothing in the nature of the case requiring them to be construed in any other than their ordinary sense.

REVERSED.

HART V. HART.

Appeal: TRIAL DE NOVO: DEFECTIVE ABSTRACT. A cause cannot be tried on its merits in this court where appellant's abstract shows on its face that it does not contain all the evidence offered by his adversary in the court below, even though the abstract states that it contains all the evidence.

Appeal from Carroll District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, MAY 18, 1888.

THIS is an action for a divorce. There was a decree by the court below for the plaintiff. Defendant appeals.

B. I. Salinger, for appellant.

E. M. Betzer, for appellee.

ROTHROCK, J.—The parties were married on the fifth day of April, 1881, and lived together as husband and wife until July 25, 1882, at which time a separation took place, and the plaintiff went with her child (the issue of the marriage) to her father's house, where she has ever since resided. She and her child have been supported by her father, and by her own personal labor. This action was commenced in April, 1885. The grounds for divorce, as set forth in the petition, are (1) desertion; (2) cruel and inhuman treatment; and (3) the drunkenness of the defendant.

It is claimed that the evidence was insufficient to authorize a decree. It is probably true that the evidence as to the alleged desertion would be insufficient. It appears that the separation was by consent. The parties were boarding at the time, and the plaintiff left the boarding-house with her child, and went to her father's house, and did not return. The defendant assisted her in going away from the boarding-house, securing her an opportunity to ride in the wagon of another person in the direction of her father's place of residence. But we think the decree may be sustained upon the ground of cruelty, and that the claim made by the appellant that this ground is not sustained by evidence, in addition to the testimony of the plaintiff, is not well founded. It appears from evidence other than the testimony of the plaintiff that for much of the time after the marriage of the parties they lived with relatives; that the defendant was addicted to drunkenness; and that, from the time of the separation until the trial in the court below, the defendant has not offered to contribute anything to the support of the plaintiff and his child. It is not shown that he is physically unable to contribute to their support by his labor. He makes no claim to the custody of his child, but seems to be entirely content that his family shall be maintained without his assistance. We do not think the record is in a condition which will authorize us to review the questions of fact in the case. It appears from an inspection of the

Serrin v. Brush.

abstract and amended abstract filed by appellant that the plaintiff introduced and examined five witnesses. The testimony of three witnesses is presented in the abstracts, but the testimony of the other two is entirely omitted. Nor, although the claim is made in the abstracts that they are abstracts of all the evidence, they show on their face that the claim is not correct. In this state of the record we cannot determine the cause upon its merits.

AFFIRMED.

SERRIN *et al.* v. BRUSH *et al.*

1. **Tax Sale and Deed : REDEMPTION IN EQUITY : CLAIM FOR IMPROVEMENTS : PRACTICE.** Under Code, section 893, in actions for the redemption of land sold for taxes, begun after the delivery of the treasurer's deed, the court must determine claims for improvements made on the land by the person claiming under the tax deed. (*Fogg v. Holcomb*, 64 Iowa, 627, *distinguished*.)
2. ——— : ——— : ——— : **COSTS.** In such case, where the land belonged to a minor at the time of sale, and the action was brought by those who inherited it from him, and all the costs made on the part of plaintiffs were incurred in the establishment of their right to redeem, and all those on the part of defendants were incurred in establishing their claim for improvements, as to which claim they succeeded, *held* that the court did not err in taxing all the costs to plaintiffs. (*Springer v. Bartle*, 46 Iowa, 688, and *Broquet v. Sterling*, 56 Iowa, 358; *distinguished*.)

Appeal from Hancock District Court.—HON. GEORGE W. RUDDICK, Judge.

FILED, MAY 18, 1888.

ACTION in equity to redeem lands from a tax sale after the execution of a tax deed. The judgment determines that plaintiff is entitled to redeem the undivided one-third of the land, and she is required, in making the redemption, to pay a specified amount on account of certain improvements made upon the land by defendants. It also taxes one-half the costs to her, and the balance to the other plaintiff. Plaintiff appeals.

George E. Clarke, for appellant.

Bush & Wichman, for appellees.

REED, J.—Plaintiff's complaint is of the provisions of the judgment which required her to pay for improvements on the land, and a portion of the costs of the action.

I. It was contended that the court could not in this action try the question as to the improvements, but that the question could only be litigated in a separate action or proceeding after the title and ownership of the property was determined; but it is provided by Code, section 893, that, in actions for the redemption of land after the delivery of the treasurer's deed, "the courts shall determine the rights, claims and interest of the several parties, including liens for taxes, and claims for improvements made on the land, by the person claiming under the tax deed." The action is brought under that section. *Fogg v. Holcomb*, 64 Iowa, 627, cited by counsel, was not an action of this character, and was not governed by that provision. It appears to us also that the amount allowed by the court for the improvements is not excessive, and that, after deducting the fair rental value of the premises from the cost of the improvements, the amount awarded by the judgment is just.

II. We are also of the opinion that the order taxing the costs to plaintiff is right. When the land was sold for delinquent taxes, it belonged to a minor relative of plaintiff, who has since died, and from whom she inherited the interest which she sought to redeem. Under the provisions of the statute (Code, secs. 892, 893) the redemption could be effected only by an action in equity. In such cases, the costs necessarily incurred in establishing the right to redeem constitute part of the expenses of the redemption, and ought to be paid by the party who exercises

1. Tax sale and deed: redemption in equity: claim for improvements: practice.

2. —: —: —: costs.

Wilson v. Duncan.

the right. The costs incurred by plaintiff were all necessarily incurred in establishing that she was entitled to redeem. The only costs made by defendant were incurred in the establishment of his claim for improvements; and as to them, as he succeeded in his claim, he was entitled to recover. The case is distinguishable from *Springer v. Bartle*, 46 Iowa, 688, and *Broquet v. Sterling*, 56 Iowa, 358, cited by counsel. Those were actions to set aside tax deeds because of irregularity and fraud in the sale; while in this case the sale was regular and valid, but, because of the minority of the owner of the property, the right of redemption was not extinguished by the deed.

AFFIRMED.

WILSON V. DUNCAN.

1. **Highways : DITCHES : CUTTING OFF ACCESS TO ADJOINING LAND : INJUNCTION.** Plaintiff sought to enjoin the construction of a ditch for surface water on the side of the highway next to his land, on the ground that the water would in time wash the ditch so deep as to cut off access to his land without the construction of bridges. But it appearing that a small outlay of money would be sufficient to prevent the washing, and that the expense of the necessary bridges would not be great, and that the future convenience of the public might require such expense to be incurred, *held* that an order absolutely enjoining the construction of the ditch was not warranted.
2. ——— : **LOCATION OF DITCH : PRESCRIPTIVE RIGHT OF ADJOINING OWNER.** The fact that a ditch for the accommodation of surface water, flowing in part from plaintiff's land, has been maintained for more than ten years on the side of the road farthest from his land, does not give him a prescriptive right to have it forever maintained there.

Appeal from Clarke District Court.—HON. J. W. HARVEY, Judge.

FILED, MAY 22, 1888.

ACTION in equity to enjoin the defendant, who is a road supervisor, from removing a culvert from a highway, and from constructing a ditch in the highway adjoining plaintiff's farm. Judgment for plaintiff, and defendant appeals.

McIntire Bros., for appellant.

W. P. Tallman and *W. M. Wilson*, for appellee.

REED, J.—Plaintiff's farm is situated on the east side of the highway which runs north and south. The land on the west side of the road opposite to plaintiff's farm is owned by Robert Pitt. Both of the farms are nearly level, affording but slight opportunity for drainage. The north part of plaintiff's farm, however, owing either to its natural shape or the manner in which it has been cultivated, drains onto the highway, and the surface water which accumulates on a tract immediately north of it flows across the northwest corner of it into the road. Many years ago the road supervisor of the district constructed a culvert in the highway immediately opposite the northwest corner of plaintiff's farm, through which the water flowed, and found its way onto the northeast part of the Pitt farm, from which it flowed onto the land north of that. The then owner of the Pitt farm, for the purpose of preventing it from flowing onto his premises, constructed a slight dam opposite the mouth of the culvert; and the road supervisor, for the purpose of draining it from the highway, constructed a ditch from that point south, along the west side of the highway, to a slough or depression which crosses the highway, draining a portion of plaintiff's land onto the Pitt farm. Subsequently that culvert was removed, and another was constructed about midway between that point and the slough, and the highway was graded in such manner that the water flowing onto it from the portion of plaintiff's farm north of the new culvert was conducted on the east side of the

1. HIGHWAYS :
ditches :
cutting off
access to
adjoining
land : injunc-
tion.

Wilson v. Duncan.

road, and passed through the culvert into the ditch. In time, the ditch was washed out to a considerable depth, and began to encroach upon the traveled portion of the highway; and defendant, for the purpose of protecting the road, and of satisfying Pitt, who complained that he was being injured by the ditch, removed the culvert, and constructed another ditch on the east side of the road from that point to the slough, so that all the water which would flow into the highway from plaintiff's land north of the slough would be conducted to it along the side of the road next to his premises. Plaintiff then brought this action, alleging as his ground of complaint that, if the water was conducted on that side of the road, it would in time wash out a ditch in front of his premises so deep that he would be compelled to maintain bridges in order to have access to the highway. The order for a temporary injunction provided that he might replace the culvert, and close the ditch from that point to the slough, and that has been done. The final judgment restrains defendant and his successors in office from removing the culvert or reopening the ditch on the east side of the road, and commands them to keep open the one on the west side as a passage-way for the water. While the action was pending, the legislature passed an act which forbids road supervisors to do any act in opening or repairing the highways which will have the effect "to destroy or injure the ingress or egress to any property, or to turn the natural drainage of the surface water to the injury of the adjoining owners."

If it could be said that the removal of the culvert and the reopening of the ditch would necessarily have the effect to injure or destroy the ingress to plaintiff's property, or otherwise injure his premises, it would follow, perhaps, that the judgment ought to be affirmed; for it is the doing of those acts in the future that is inhibited by the judgment, and they would be forbidden by the statute. But that is not shown. The evidence clearly shows, we think, that by the outlay of a small amount of money and labor the washing out of the ditch can be

 Ellison v. Harrison County.

prevented, and that the cost of constructing and maintaining the bridges necessary to afford convenient and safe passage between plaintiff's premises and the highway would not be great; and it may occur in the future that the public safety or convenience will demand that these expenses be incurred, rather than that the water should continue to be conducted on the other side. So that the judgment ought not to be sustained in all of its provisions, unless it can be said that plaintiff has the absolute right to have the water conducted on the opposite side of the highway from his premises. The ditch had

2. — : location of ditch : prescriptive right of adjoining owner. been maintained on that side for more than ten years, and it was contended that plaintiff has a prescriptive right to have it continued. But, very clearly, he has no such

right. The water being mere surface water, he has the right to have it flow unobstructed from his premises. He has the right also to have it so cared for by the adjoining proprietor, onto whose premises it flows from his own, that his premises will not thereafter be injured by it. But this is the extent of his right, and he has no interest in the manner of its disposition after that. The judgment will be so modified as to forbid the removal of the culvert or the reopening of the ditch, except upon the conditions here indicated; and this modification will be made in this or the district court, as the parties may elect.

MODIFIED AND AFFIRMED.

ELLISON V. HARRISON COUNTY.

Paupers: SUPPORT BY TOWNSHIP TRUSTEES: POWER OF SUPERVISORS TO DISCONTINUE. Under sections 1861 and 1865 of the Code, the board of supervisors of a county having a poor-house may discontinue relief to a poor person, after the township trustees have once determined that he is a proper subject for relief, and that, in their judgment, he should not be sent to the county poor-house.

Appeal from Harrison District Court.—HON. C. H. LEWIS, Judge.

FILED, MAY 22, 1888.

Ellison v. Harrison County.

PLAINTIFF sued on a claim for the support of a pauper. He pleaded a contract with the township trustees, alleging that the trustees had, upon investigation, determined that the pauper was a proper subject for relief, and that he should not, in their judgment, be sent to the county poor-house, and that they contracted with him for his support, and that he rendered the services under that contract. The county answered, in substance, that it maintained a poor-house; that the pauper was neither a soldier nor a member of a soldier's family; and that, when the case was reported to the board of supervisors, they allowed plaintiff's bill for his services under the contract up to that date, but decided to deny further relief under that arrangement, and directed that the pauper (who was in a condition to be removed to the poor-house) be thereafter maintained in the poor-house. Plaintiff's demurrer to the answer having been overruled, he elected to stand thereon, and judgment was entered dismissing his petition, and he appeals.

J. H. Smith, for appellant.

L. R. Bolter & Sons, for appellee.

REED, J.—The question in the case is whether the board of supervisors may deny relief to a poor person after the township trustees have once determined that he is a proper subject for relief, and that, in their judgment, he should not be sent to the county poor-house. Section 1361 of the Code is as follows: "The trustees of each township shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county poor-house. * * * The relief thus furnished may be in the form of food, clothing, fuel, lights, rents, medical attendance, or money; but, exclusive of medical attendance, the relief thus furnished shall not exceed the sum of two dollars per week for each person." Section 1365 is as follows: "The poor must

Ellison v. Harrison County.

make application for relief to the trustees of the township where they may be, and, if the trustees are satisfied that the applicant is in such state of want as requires relief at the public expense, they may afford such relief as the necessities of the person may require, and shall report the case forthwith to the board of supervisors, who may continue or deny relief as they find cause."

If these sections are applicable to the same subject, and are to be considered together, there can be no question but the boards of supervisors possess the power attempted to be exercised in the present case. Counsel for appellant contends that they are not of that character. His position is that section 1361 defines the powers and duties of the township trustees in counties which maintain poor-houses, and that the other section is definitive of those powers and duties in counties which do not have poor-houses, and consequently they are to be construed separately; and that, as the powers conferred by the former are general, and there is no provision authorizing the board of supervisors to take any action with reference to the subjects covered by it, the action of the trustees is final. We are of the opinion, however, that this position is not sound. It is true that the section immediately preceding section 1365 relates to the powers of the trustees in counties not having poor-houses. The provisions of section 1365, however, are not limited by it, but are general in their nature. There is nothing in the nature of the case, nor in the language of either of the sections, requiring that the provisions of the latter should be so limited. It is important for the protection of the public interest that the power to terminate the action of the trustees under section 1361 be lodged either in the trustees or some other body. But no such power is conferred upon the trustees, unless, possibly, in cases where relief is extended on account of physical disability which should afterwards be removed. It might often happen, however, that the necessity for relief would cease by the occurrence of circumstances not reasonably to be apprehended when the

Sims v. Moore.

action was taken ; as by a change in the financial condition of the subject, or of relations who, under the provisions of the statute, may be compelled to support him. In such cases, if appellant's position be correct, there would be absolutely no power to terminate the action ; and if, as was the case in this instance, the trustees have contracted for his support for a definite period, the county would be bound absolutely for the whole period. And it was doubtless in view of such possible instances that the provisions of section 1365, making it the duty of the trustees to report the case to the board of supervisors, and conferring upon that body the power to "continue or deny relief, as they find cause," were enacted. The two sections (1361 and 1365), when construed together, mean that the trustees have the power to grant temporary relief to such poor persons as in their judgment should not be sent to the poor-house, but the power to determine whether such relief shall be continued is vested in the board of supervisors ; and this view is entirely consistent with our previous holdings in cases arising under the statute. The judgment is right, and it will be

AFFIRMED.

74	497
119	811
74	497
133	330

SIMS V. MOORE *et al.***Fraudulent Conveyance : TO WIFE TO DEFEAT HUSBAND'S CREDITORS.**

Where a wife delivers money to her husband to be invested and proceeds accounted for, but no special accounting is ever had, but the obligation is never released, she may take a conveyance of property belonging to her husband in order to protect her interests, even though the husband has other creditors who may suffer thereby.

Appeal from Page District Court.

FILED, MAY 22, 1888.

VOL. 74—32

THE defendants are husband and wife. The plaintiff is a judgment creditor of the husband. This action was brought to subject certain property, the title to which is in the wife, to the payment of the judgment, upon the ground that the title was taken in the name of the wife in fraud of the creditors of the husband. There was a decree in the district court for the defendants. Plaintiff appeals.

W. P. Ferguson, for appellant.

G. B. Jennings, for appellees.

ROTHROCK, J.—The case is here for trial anew. The burden of proof is on the plaintiff to establish the averments of his petition by a preponderance of the evidence. The proof is undisputed that, within a short time after the marriage of the defendants, the wife received eight hundred and thirty dollars from her father's estate. It is also undisputed that she delivered this money to her husband. Both of the defendants testify that the delivery of the money to the husband was not a gift to him, but that it was agreed between them that he should loan and invest it for her as her agent, and account to her for the proceeds. No special accounting was had, but it appears that the obligation to do so was never released nor abandoned. It is claimed by the defendants that the property in controversy was paid for from this fund, and that the wife, being a creditor, had the right to protect her interests notwithstanding the husband had other creditors who might suffer thereby. There is the usual effort upon the part of the plaintiff to show a fraudulent transaction. A careful examination of all the evidence leads us to the conclusion that the decree of the district court ought not to be disturbed.

AFFIRMED.

THE STATE V. REYELTS.

Intoxicating Liquors : NUISANCE : INDICTMENT : CHANGE OF REMEDIES AND PENALTIES DURING PERIOD COVERED BY INDICTMENT : CONVICTION FOR SINGLE SALE. The indictment for nuisance in this case charged unlawful sales of intoxicating liquors on divers days between the first day of January, 1884, and the finding of the indictment, which was May 4, 1886. An amendment to the statute, which took effect July 4, 1884, provides the remedy by injunction, and that one convicted under the statute should not be released under the poor-convict law. Another amendment, which took effect April 8, 1886, increases the penalties for maintaining nuisances of this character. *Held—*

- (1) That, since the indictment sufficiently charged a nuisance, which was, under all the said statutes, alike an indictable offence ; and since the amendments only relate to penalties and proceedings to suppress the unlawful traffic, therefore the indictment was not bad on account of failing to allege under which statute the defendant was charged.
- (2) That, since the evidence clearly showed unlawful sales after the first day of January, 1884, and before the eighth day of April, 1886, defendant was lawfully sentenced under the statute as it stood up to the last-named date.
- (3) That an instruction that a single unlawful sale would warrant a conviction for the nuisance was not erroneous.

[ROBINSON and SEEVERS, JJ., *dissenting.*]

Appeal from Cedar District Court.—HON. L. G. KINNE,
Judge.

FILED, MAY 22, 1888.

DEFENDANT was indicted and convicted of maintaining a nuisance by keeping a saloon for the unlawful sale of intoxicating liquors. He now appeals to this court.

Hayes & Schuyler and Piatt & Carr, for appellant.

A. J. Baker, Attorney General, for the State.

BECK, J.—I. The indictment charges sales made on divers days between the first day of January, 1884, and the finding of the indictment. The court instructed the jury that a single unlawful sale, if found by them, would warrant conviction on the indictment.

II. Subsequent to January 1, 1884, and before the day of the finding of the indictment, the time within which the crime in the indictment is laid, the statutes relating to the sales of intoxicating liquors were twice amended. The first amendment, taking effect July 4, 1884, provides for injunctions to restrain the manufacture and sale of intoxicating liquors, and that one convicted should not be released under the statute for the release of poor convicts from imprisonment. The second, taking effect April 8, 1886, increases the penalties for maintaining nuisances by keeping places for the unlawful sale of intoxicating liquors. There is a saving clause in each amendment to the effect that acts done and penalties incurred shall not be affected by the amendment, but shall be prosecuted and enforced under the prior statutes.

III. It is insisted that the indictment is bad, as it does not allege under which statute the defendant is charged, and therefore there can be no conviction. But it cannot be doubted that the indictment sufficiently charges a nuisance, which was, under all the statutes referred to, alike an indictable offense. The amendments only relate to penalties and punishments, and proceedings to suppress the sale of intoxicating liquors unlawfully made. These matters need not be averred or referred to in an indictment. The court simply looks at an indictment to discover if a crime be sufficiently charged. If it be, matters pertaining to punishment and proceedings to suppress the crime are for after-consideration. The indictment was, therefore, rightly held good by the district court.

IV. The defendant being properly put upon his trial on the indictment, his conviction is lawful if the evidence sufficiently shows that he is guilty of the

The State v. Reyelts.

crime charged as being committed before the amendatory act last above referred to took effect. Upon this question there can be no doubt. The testimony clearly shows sales of intoxicating liquors after the first day of January, 1884, and before the eighth of April, 1886, when the amendatory statute took effect. He was lawfully tried and convicted upon the indictment, and lawfully sentenced under the statute as it stood prior to the last amendment referred to in this opinion.

V. The district court rightly directed the jury that a single sale would warrant a conviction for the nuisance. The keeping of intoxicating liquors, with the intent to sell them contrary to law, is the act of defendant creating the nuisance. One sale will disclose the unlawful intent as well as the keeping. Hence upon one unlawful sale a conviction may be had for nuisance. This we understand is the recognized rule in this state. The conclusions we announce as applicable to the facts of this case are surely correct. The evidence shows, without dispute, that, during the whole time alleged in the indictment as the period in which the offense was committed, defendant maintained a saloon in which he kept intoxicating liquors, with the intent to sell them in violation of law. This case is readily distinguished, upon its facts, from *Com. v. Maloney*, 112 Mass. 283.

These considerations dispose of all questions in the case. The judgment of the district court is

AFFIRMED.

ROBINSON, J. (*dissenting*). — The indictment charges defendant with the crime of nuisance, committed "on the first day of January A. D. 1884, and on divers other days and times between that day and the finding of this indictment," etc., and was found on the fourth day of May, 1886. A demurrer to the indictment was overruled. Four witnesses testified to the procuring and drinking of liquor at defendant's saloon. Of these one does not fix the dates of the acts concerning which he testifies. The others say the times of

which they speak may have been after April 8, 1886. Among the instructions given to the jury was the following:

“If you find from the evidence that at any time between the first day of January, 1884, and the fourth day of May, 1886, and at the place charged, the defendant kept, used, or occupied the building as charged, and therein sold, or therein kept for sale, and with intent to sell, any whisky, then he would be guilty as charged; or if he sold or kept for sale therein any other article of liquor, and you are satisfied from the evidence that the same was an intoxicating liquor, then he would be guilty; and a single sale of any such liquors above enumerated would constitute the crime of nuisance.”

Defendant duly preserved exceptions to the ruling on the demurrer, and to the giving of the paragraph of the charge quoted, and properly presents these rulings for review.

The indictment is required to be direct and certain as regards “the offense charged.” Code, sec. 4298, par. 2; 1 Bish. Crim. Proc., sec. 543; 1 Whart. Crim. Law, secs. 299-304. It must charge the offense with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the law of the case. Code, sec. 4305, par. 5; 1 Bish. Crim. Proc., sec. 77 *et seq.* “When, therefore, one stands before a court charged with particular acts, and the law has attached to them a specified punishment, or has made them in no degree punishable, the court cannot, without overturning fundamental justice, inflict on him a punishment not legally appropriated to them; and it makes no difference that he is in fact guilty of more than is charged, or that more is proved.” 1 Bish. Crim. Proc., sec. 80. “The doctrine of the courts is identical with that of reason, namely, that an indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.” 1 Bish. Crim. Proc., sec. 81. “Every indictment must distinctly set down

The State v. Reyelts.

each and every individual act and intent which, in matter of law, determines or influences the punishment; and not the least of the reasons for this is that it may guide the court in pronouncing the sentence." 1 Bish. Crim. Proc., sec. 538; see, also, secs. 507, 541; Bish. St. Crimes, sec. 444. "From necessity, an information which is so uncertain that upon a plea of guilty the court cannot know what punishment it may inflict, is bad on motion in arrest of judgment." *Vogel v. State*, 31 Ind. 66. The language used by the court in the case of *Com. v. Maloney*, 112 Mass. 284, is clear and pertinent, and is as follows: "If a statute changes the punishment of an existing offense by imposing a severer penalty, with a clause saving from its operation offenses already committed, the allegation of time is material. The nature and character of the offense, and the penalty affixed to it, depend upon the time when the act charged is committed. If, in such a case, an indictment alleges the act to have been committed before the passage of the statute enlarging the penalty, the offense charged, and the punishment annexed to it, are different from the offense and punishment if the act is committed after such time. They are different offenses, and an allegation of one is not sustained by proof of the other." To the same effect is *Grimme v. Com.*, 5 B. Mon. 263. Ordinarily, it is not necessary to state in the indictment the precise time at which an offense was committed. Code, secs. 4301, 4305, par. 4. But this court has held that the date, thus fixed, may determine the jurisdiction of the court (*State v. Rollet*, 6 Iowa, 535); and where perjury was charged to have been committed by means of a false oath taken before an officer named, but four days before such officer could have qualified under the statute, the indictment was held vulnerable to demurrer, and it was also held that such defect could not be cured by proving that the oath was in fact administered at a date later than that named in the indictment. *State v. Phippen*, 62 Iowa, 54.

It is said that the indictment charged the crime of nuisance, and that this offense was the same after that

The State v. Reyelts.

it was before the amendments in question took effect. This is true, but a statute which increased the punishment of an offense already committed would be void as *ex post facto*. Const. U. S., art. 1, sec. 10; Const. Iowa, art. 1, sec. 21; Bish. St. Crimes, sec. 176; *State v. Squires*, 26 Iowa, 346. Therefore it is as necessary to distinguish between the unlawful acts committed before and those committed after the amendment increasing the punishment took effect, as though they related to crimes of different kinds. For all practical purposes, they constitute separate and distinct offenses. An examination of the authorities cited, and a consideration of the principles involved, lead me to the conclusion that the majority opinion is erroneous. The indictment should have restricted the alleged offense to time prior to the date on which the amendment increasing the punishment took effect. But I am of the opinion that its defect in this respect was not necessarily prejudicial. The alleged offense is charged to have been committed "on the first day of January, 1884, and on divers other days and times between that day and the time of the finding of this indictment." An allowable construction of this is that all which charges unlawful acts after the taking effect of the amendment aforesaid is surplusage, which should be rejected. 1. Whart. Crim. Law, secs. 266, 622, 624; *State v. Smouse*, 49 Iowa, 636, and 50 Iowa, 45. But it was the duty of the district court to restrict the evidence to the time properly covered by the indictment, and it therefore erred in giving the part of the charge quoted. It is a well-settled rule that no presumption can be created to aid in the conviction of a person on trial for a particular crime by showing that he has been guilty of other offenses. 1 Bish. Crim. Proc., sec. 1120; *State v. Walters*, 45 Iowa, 390. This case does not fall within the exceptions to that rule. The jury were told, in effect, if not in terms, that proof of a single sale after the eighth day of April, 1886, would sustain a verdict of guilty. In other words, the jury were told that no evidence of the crime charged by

The State v. Kirkpatrick.

the indictment was required, but that they might convict of that crime if another crime of like nature was shown to have been committed, although at a later date. It is not a satisfactory answer to say that defendant was not prejudiced by the matters of which he complains, for the reason that the mildest punishment provided for the crimes proven was adjudged. That is only another way of saying that, although the defendant was put upon trial for an offense of which he was not properly charged, in connection with one of which he was legally accused, and although it cannot be told from the verdict of what offense he was convicted, yet it satisfactorily appears that he ought to be punished for something; hence he ought not to be heard to complain. It seems clear that such a method of administering justice is dangerous in the extreme, and that it ought not to be sustained. It is the right of every one on trial for an alleged crime to know of what he is accused, and to be tried, and, if convicted, to be punished for that alone. I conclude that the case should be reversed.

SEEVERS, C. J., unites in this dissent.

74	505
110	340

THE STATE V. KIRKPATRICK.

Criminal Law : JOINT INDICTMENT : SEPARATE TRIALS : DISCRETION OF COURT. It is within the discretion of the trial court to grant or refuse separate trials to defendants jointly indicted, where the offense charged is less than a felony. (Code, secs. 4012, 4424.)

Appeal from Decatur District Court.

FILED, MAY 22, 1888.

DEFENDANT appeals from a judgment which required him to pay a fine of two hundred dollars, and ordered his committal to the Decatur county jail for the term of sixty days unless said fine should be paid.

ROBINSON, J.—This cause was submitted on a transcript of the record entries, appeal-bond and notice of appeal. No argument was made for either party. We infer, from recitals in the record, that defendant was jointly indicted with another for lewdness. He demanded a separate trial, which was refused. In this there was no error, for the reason that the offense of which he was charged was not a felony, and it was within the discretion of the district court to refuse a separate trial. Code, secs. 4012, 4424. Exceptions were taken by defendant to the overruling of a motion for a change of place of trial, and on motion for a new trial. As the grounds of the motions are not shown, we cannot review these rulings. We have examined the record with care, but have found no error. . AFFIRMED.

BREWSTER V. REEL.

1. **Evidence: WRITTEN CONTRACT: COLLATERAL ORAL AGREEMENTS.** Collateral oral agreements, while they are inadmissible to vary a written contract, may be proved for the purpose of showing that the contract never had a legal existence. (Compare *Bowman v. Torr*, 8 Iowa, 573.)
2. **Partnership: POWER OF PARTNER TO CONVEY FIRM PROPERTY TO PAY COPARTNER'S DEBT.** A partner has no power to convey the firm property to pay the debt of his copartner, without the latter's consent; which cannot be presumed from any supposed advantage to him of the transaction.
3. **Bill of Sale: DELIVERY.** A bill of sale made to secure a claim is delivered to the owner of the claim by delivery to his attorneys authorized to secure the claim.

Appeal from Council Bluffs Superior Court.—HON. E. E. AYLESWORTH, Judge.

FILED, MAY 22, 1888.

ACTION to recover the possession of personal property of the agreed value of twenty-one hundred and fifty dollars. The case was tried to the court, and judgment rendered for defendant. The plaintiff appeals.

74	506
127	366
74	506
143	336

Smith & Harl, for appellant.

Wright, Baldwin & Haldane, for appellee.

ROBINSON, J.—On the eighteenth day of November, 1885, the copartnership of P. C. & W. D. Kirkland was engaged in business in the city of Council Bluffs, and owned the stock of goods in controversy. P. C. Kirkland, a member of the firm, was at that time indebted to plaintiff. On the day named, the plaintiff telegraphed from Kansas to a law firm in Council Bluffs: "Attach or secure my claim against P. C. Kirkland." Members of the firm, which received the dispatch on the day it was sent, procured from P. C. & W. D. Kirkland a bill of sale covering their stock in trade, which included the property in controversy. The bill of sale was in favor of plaintiff, was executed by W. D. Kirkland in the name of the firm, and was recorded on the day of its date. After it was recorded, the defendant, as sheriff, levied upon the property in question, and subsequently sold it, and applied the proceeds to the payment of a judgment against W. D. Kirkland. Plaintiff seeks to recover by virtue of the bill of sale.

I. The assignment of errors presents for our consideration the correctness of the rulings of the superior court in admitting certain testimony. It was contended by defendant that there was no consideration for the bill of sale; that it never had a legal existence, and was never in fact delivered. The testimony to which objection was made, in fact, tended to show that the bill of sale was given on account of the personal debt of P. C. Kirkland, without his consent or knowledge. It also tended to show that, during the conference which led to the execution of the bill of sale, the attorneys for plaintiff told W. D. Kirkland that it was their desire to secure for plaintiff whatever interest P. C. Kirkland had in the stock; that the bill of sale should be given only to secure to plaintiff any claim which P. C. Kirkland

1. EVIDENCE:
written con-
tract: collat-
eral oral
agreements.

Brewster v. Reel.

might have in the goods after the creditors of the firm and W. D. Kirkland, Jr., had been paid their claims; and that the bill of sale was given pursuant to these propositions. As we understand the record, this evidence was objected to on the ground that it sought to vary and contradict the terms of a contemporaneous written instrument. It is evident that parol evidence would not be competent to give to the instrument the effect which seems to have been contemplated in the preliminary negotiations; but it was competent as tending to show, in connection with other evidence, that the instrument never in fact had a legal existence. *Bowman v. Torr*, 3 Iowa, 573; 1 Greenl. Ev. sec. 284; 2 Whart. Ev. sec. 927, and notes; 2 Tayl. Ev. sec. 1135. While it is true, as a rule, that each partner is authorized to act

2. PARTNERSHIP:
power of
partner to
convey firm
property to
pay copart-
ner's debt.

for and in the name of the firm, yet his power to do so is limited to matters within the scope and ordinary business transactions and purposes of the copartnership. *Boardman v. Adams*, 5 Iowa, 229. It is well settled that a partner cannot pledge the firm credit, nor use the firm property, to secure or pay his individual debts. *Sternburg v. Callanan*, 14 Iowa, 256; *Rutledge v. Squires*, 23 Iowa, 58; *First Nat. Bank v. Carpenter*, 34 Iowa, 436; *Waller v. Davis*, 59 Iowa, 108; *Thomas v. Stetson*, 62 Iowa, 537. In this case, W. D. Kirkland did not attempt to transfer the firm property on account of his own liability, but he did attempt to transfer it on account of the debt of a copartner. Had the latter requested or ratified such use of the firm property, it may be conceded that a valid title to the goods in controversy would have vested in plaintiff; but, as we have seen, the bill of sale was executed without the consent or knowledge of P. C. Kirkland. It is not shown that he ratified it, and his assent cannot be presumed from the fact that it was made on account of his personal debt. It is shown that there are numerous creditors of the firm, and he may have desired to have them first paid from the firm property, or he may have preferred some other disposition of it. So far as is shown by the

The State v. Deuble.

record, the bill of sale was as unauthorized as though it had been designed to pay a liability of the partner who executed it. This being true, there does not appear to have been any authority to execute and deliver it for the purpose stated. The evidence in question tended to establish these facts, and was admissible for that purpose. No question is made by the assignment of errors as to the sufficiency of the evidence, in case it was admissible, to sustain the finding of the court.

II. Complaint is made that one of the attorneys who acted for plaintiff in taking the bill of sale was permitted to testify to a conversation he had with plaintiff, while the relation of attorney and client existed, in regard to the alleged refusal of plaintiff to accept the bill of sale. Under the view we take of the case, the question is not material. It may be well to say, however, that the attorneys were authorized to secure a claim against P. C. Kirkland; hence delivery of the bill of sale to them was, in law, a delivery to plaintiff.

Objection is made to other evidence; but the evidence was not prejudicial, in view of the facts and law of the case, and need not be considered at length.

AFFIRMED.

THE STATE V. DEUBLE.

Criminal Evidence: RES GESTAE: WHAT IS NOT. Where a woman had been shot, but had had her wound dressed, and had lain down upon a sofa, and then, in response to one seeking information, she related with particularity and at length circumstances occurring and conversations between her and defendant had before the wound was given, and stating that defendant was drunk at the time and purposely shot her, *held* that evidence of the statements so made was not admissible as being of the *res gestae*. (*State v. Driscoll*, 72 Iowa, 583, distinguished.)

74	509
124	499

Appeal from Union District Court.—HON. JOHN W. HARVEY, Judge.

FILED, MAY 23, 1888.

The State v. Deuble.

DEFENDANT was convicted of an assault with intent to commit murder, and was sentenced to imprisonment for three years in the penitentiary. He now appeals to this court.

Hanna & Porter, for appellant.

A. J. Baker, Attorney General, for the State.

BECK, J.—I. The indictment alleges that defendant, with the intent to kill and murder, did shoot one Lottie Jourdan in the head, inflicting a dangerous wound. A witness testified at the trial that, while he and his father were at supper, word was hastily brought to them that a man "was murdering a woman" in the direction of a neighbor's house. They hurried to the rescue. The witness testified that he heard screams for help made by the woman, and soon saw her running, followed by the defendant with a revolver in his hand. The witness went the distance of a block and procured a revolver, and returned to the house into which the woman had entered. He found defendant at the house, who declared that the woman had shot herself, and that "he wanted to go in and help her; that she was bleeding to death." The door was locked, but unlocked to admit the witness, who found the woman "sitting in a chair, with her face covered with blood." He washed the blood from her face and tied a handkerchief around her head, when she lay down upon a sofa. The witness was then permitted to testify, against defendant's objection, that he asked the woman how she had received the wound, when she related with particularity and at length circumstances occurring, and conversations between her and defendant had before the wound was given, and the fact that at the time defendant was drunk. Her statement was to the effect that defendant purposely shot her, and was made in response to an inquiry by the witness, after the affair was wholly over, and the woman had received assistance and care from the witness and others.

The State v. Deuble.

II. The district court admitted the evidence on the ground that the statement of the woman was of the *res gestae*. We think it was erroneously admitted. The statement was not in the nature of declarations made while the affair was in progress; nor was it intended to disclose the fact that a crime had been committed, and to discover and identify the offender. It was in the nature of a particular narrative of the affair, giving with considerable minuteness the manner in which the wound was inflicted, thus showing it was by the voluntary act of the defendant. It was, in fact, a narrative of the affair after it had been fully enacted and was fully known. *Res gestae* are matters occurring in connection with the act which serve to disclose the crime and point out the offender. They are not recitals of matters which have occurred. It is often difficult to determine just what things are to be regarded as *res gestae*. But it has never been claimed that a narrative of a transaction after it is over, as the statement in question clearly was, is to be regarded as of the *res gestae*. In *State v. Driscoll*, 72 Iowa, 583, declarations as to the fact of a robbery, and the pointing out of the robbers, made soon after the crime, to direct pursuit of the criminals, was held to be of the *res gestae*. So in *Com. v. McPike*, 3 Cush. 181, voluntary declarations as to the cause and manner of the injury, made soon after it was received, and immediately upon the discovery of the injured person, were held to be of the *res gestae*. In these cases, the evidence consisted of voluntary declarations made upon discovery of the crime, and soon thereafter, intended to identify the criminal and direct pursuit. In this case, as we have shown, the statement admitted in evidence is a narrative of the affair elicited by an inquiry made by one desiring to gain knowledge of the facts connected with it. The distinction between the facts of this case and those of the cases cited are obvious, and serve to point out the matters which are admissible under the rule of *res gestae*. The evidence in question, we think, ought not to have been admitted. It is proper to add that the woman who was wounded

Larsh v. The City of Des Moines.

testified at the trial that the wound was wholly accidental, and was received while she was attempting to take the revolver from the defendant.

In our opinion, the judgment of the district court ought to be

REVERSED.

LARSH V. THE CITY OF DES MOINES.

1. **Cities and Towns: INJURY ON DEFECTIVE STREET: CONTRIBUTORY NEGLIGENCE: INSTRUCTION.** In an action for an injury to plaintiff's wife caused by a defect in defendant's street-crossing, plaintiff asked the court to instruct the jury that knowledge on the part of his wife of the condition of the crossing, and that it was dangerous, would not prevent a recovery, if she exercised proper care while crossing the street. *Held* that it was not error to refuse this instruction, since every fact which would entitle plaintiff to recover was stated in an instruction given.
2. ——— : ——— : **GRADE OF SIDEWALK: INSTRUCTION.** In such case, where the injury occurred while passing from the street to the sidewalk, it was not error to refuse to submit to the jury the question whether the defendant was negligent in not lowering the sidewalk to a level with the curb of the street, since, all through the court's instructions, the fact was kept prominent that, if the city should have constructed an apron or approach from the street, it should have been from the street to the sidewalk, and not merely to the top of the curb.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, MAY 23, 1888.

THIS is action for a personal injury received by the wife of the plaintiff upon one of the streets of the city, by reason of a defect in a street-crossing, as is alleged. There was a trial by jury, and a verdict and judgment for the defendant. The plaintiff appeals.

Larsh v. The City of Des Moines.

Cole, McVey & Clark, for appellant.

Detrick & McMartin and *Hugh Brennan*, for appellee.

ROTHROCK, J.—I. It appears that in the year 1883 the city cut down the grade of East Locust street some two feet, and paved the street. Second street intersects Locust street at right angles, and ends on the south side of Locust street; that is to say, Second street runs from a point south to an intersection with Locust street, and extends no further. There is a sidewalk east and west on the north side of Locust street, and a sidewalk on the west side of Second street up to its intersection with Locust street. The sidewalks are some two feet above the level of the street after it was paved. Curbing was set for the purpose of paving, and the top of the curb was considerably lower than the surface of the sidewalk, which was made of wood, and was not of the full width of the ground intended for a sidewalk. The city constructed an apron or approach¹ at the intersection of the streets on the south side of Locust street, so that persons could reach the street with reasonable safety. No apron or approach was made to the sidewalk on the north side of Locust street. The plaintiff's wife attempted to cross over Locust street, and, in attempting to go upon the sidewalk on the north side, she fell against the curb-stone and sidewalk, and was injured. The questions submitted to the jury were whether the defendant was negligent in failing to construct an approach from the sidewalk to the street, and whether the plaintiff was free from contributory negligence in attempting to make the crossing. The evidence tended to show that she knew the condition of the street and crossing before she received the injury complained of.

The plaintiff complains of the refusal of the court to give the following instruction to the jury:

VOL. 74—33

1. Cities and towns: injury on defective street: contributory negligence: instruction.

Larsh v. The City of Des Moines.

“ Knowledge on the part of Mrs. Larsh of the condition of the crossing, and that it was dangerous, will not prevent the plaintiff from recovering if she had this knowledge, and exercised proper care while crossing over to the north side of Locust street.”

The court instructed the jury, on its own motion, upon this branch of the case, as follows:

“ If you find that plaintiff's wife was injured as alleged, you will first determine whether it was without fault or negligence on her part. Every person is bound to use reasonable care and diligence in walking along and across streets. Reasonable care is that degree of care which an ordinary, careful and prudent person would exercise under the circumstances, and negligence is the want or absence of such care. You are to say whether in walking where, when and as she did, she was guilty of negligence directly contributing to cause the injury; and, in determining that, you are to consider her knowledge of the condition of the locality, the length of time it had been in the condition it was, the nearness or remoteness of proper approaches, if any, which she might have used, and all other facts and circumstances proven. If you find she was guilty of such negligence, then plaintiff cannot recover, even though defendant was negligent as alleged.”

In our opinion, the refusal to give the instruction asked was not erroneous, in view of the instruction given. It is true, the jury are not plainly told, in the instruction given, that the fact that the plaintiff's wife knew of the condition of the crossing did not necessarily prevent a recovery. But every fact which would entitle her to a recovery was stated in the instruction. It was surely proper for the jury to consider the fact that she knew of the defect complained of; and as the court, by its instructions, allowed the jury to determine from all the evidence whether she was properly chargeable with contributory negligence, the plaintiff was properly entitled to nothing more specific and definite. If the court had instructed the jury that the plaintiff

Butterfield v. Wilton Academy.

could not recover if she knew of the defect, and walked into it, then there might be just cause of complaint.

II. It is further insisted that the court erred in not submitting to the jury the question whether the defend-

ant was negligent in failing to lower the sidewalk to a level with the top of the curbing. We think there was no error in

this. It will be remembered that, at the place where the accident happened, there was no intersection of streets. The sidewalk on the north side of Locust street was a continuous walk. It is not always required that the grade of sidewalks be lowered to a level with the curb. They may properly be terraced down to the curb. Now, all through the court's instructions to the jury, the fact is kept prominent that, if the city should have constructed an apron or approach from the street, it should be from the street to the sidewalk. If this had been done, there would be no ground of complaint that the sidewalk was not graded down to a level with the top of the curb.

We discover no ground for a reversal of the judgment, and it will be

AFFIRMED.

BUTTERFIELD *et al.* v. WILTON ACADEMY *et al.*

1. **Judicial Sale : PROPERTY HELD IN TRUST FOR CORPORATION : TRUSTEES NOT PARTIES.** Land was deeded in trust to the trustees of a corporation, and the deed imposed upon them duties in regard to the land different from their duties as trustees of the corporation. The land was sold upon the foreclosure of a mechanic's lien against the corporation, the trustees not being made parties to the action. *Held* that the sale was void, as to them as trustees under the deed, and neither divested them of the title nor terminated the trust.
2. **Trusts : DEED OF LAND : CONDITION BROKEN : REVERSION.** Land was conveyed to trustees for certain purposes and upon certain conditions, upon the failure of which it was to be sold, and a part of the proceeds, or, in a certain contingency, all of them, were to go to the heirs. *Held* that, upon a failure of the purposes and conditions, the sale and distribution of the proceeds were to be made by the trustees, and that the heirs were not entitled to recover the possession of the property.

74	515
85	405
74	515
d107	721

Butterfield v. Wilton Academy.

Appeal from Muscatine District Court.—HON.
WALTER I. HAYES, Judge.

FILED, MAY 23, 1888.

PLAINTIFF Laura F. Butterfield is the widow, and the other parties plaintiff are the children and heirs at law, of Franklin Butterfield, deceased. The said Franklin Butterfield, in his lifetime, conveyed the real estate in controversy to the trustees of the Wilton Collegiate Institute. After his death one W. F. Hayford recovered a judgment against said institute establishing and foreclosing a mechanic's lien on the property for work done and materials furnished in making certain repairs of the building situated thereon. The property was sold under special execution issued on said judgment, and the certificate of sale was assigned to defendant Levi Herr, to whom the sheriff executed a deed. He subsequently conveyed to the Wilton Academy. The Wilton Collegiate Institute was an educational institution, founded and maintained by the "Free-Will Baptists," but before the sale that denomination had ceased to maintain a school in the property. The Wilton Academy is also an educational institution, but was founded and is maintained by another religious denomination, although its prescribed course of study is substantially the same as that formally prescribed by the collegiate institute. Plaintiffs brought this action for the recovery of the property on the alleged ground that the sale of the property under judicial process, and the failure of the "Free-Will Baptists" to maintain a school in it, were in violation of the conditions contained in the deed of their ancestor, and consequently it had reverted to them. The district court entered judgment for defendants, and plaintiffs appeal.

Richman & Burk, for appellants.

J. Carskaddan, for appellees.

Butterfield v. Wilton Academy.

REED, J.—The following is a copy of the material portions of the deed from Franklin Butterfield:

1. JUDICIAL
sale : property
held in trust
for corpora-
tion : trustees
not parties.

“This deed of bargain and sale made and executed this twenty-first day of August, A. D. 1876, by and between F. Butterfield and Laura F. Butterfield, of the county of Cedar, state of Iowa, of the first part, and the trustees of Wilton Collegiate Institute of the second part, witnesseth—that the said party of the first part, for a consideration of one (\$1.00) dollar, in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted and sold, and do by these presents grant, bargain, sell, convey and confirm, unto the said second party, their successors and assigns, forever, the following real estate, lying and being situate in the county of Muscatine and state of Iowa, to-wit: Block No. eight (8), in North Wilton, known as the ‘Seminary Property.’ This conveyance is made and accepted upon the understanding and with the express condition that said property shall never be subject to nor sold for any indebtedness of the institution that has been contracted or may hereafter be contracted. And it is further provided that if the Free-Will Baptists shall fail to keep a good school, in accordance with the charter of the institution, in the building on said premises, or in the buildings to be erected on said premises, for the term of five years from this date, then the said premises shall be sold, and fifteen hundred dollars of the proceeds shall be given to the Free-Will Baptist Church of Wilton; provided, that they erect a church within three years from the date of the sale of said property. If not, to revert to my heirs. Said Baptist Church to have the use of the chapel for church purposes when not interfering with the school; provided they keep the same, and the fence around the grounds, in repair. The remainder to revert to my heirs. To have and to hold the premises above described, with all the appurtenances thereto belonging, unto the said second party, their successors and assigns, forever. * * *”

Butterfield v. Wilton Academy.

Counsel for the respective parties have argued the questions as to the validity of the conditions contained in the deed. The position of counsel for the appellees is that the deed is an absolute grant of the property to which the subsequent conditions are repugnant, and hence they are void under the rule laid down in *Case v. Dwire*, 60 Iowa, 442 ; while on the other hand it is contended by counsel for appellants that, when all of the provisions of the instrument are considered, it is a conveyance to trustees for a specific purpose, and, that being its character, it was competent for the grantor to attach to the trust whatever conditions he might choose. We have not found it necessary, however, to go into the question as to their validity ; for, conceding that the character and effect of the instrument are as claimed by appellants, it by no means follows that they are now entitled to the possession of the property, which is the relief demanded. If that is the character and effect of the conveyance, which, for the purposes of the case, is conceded, it imposes powers and duties upon the trustees entirely distinct from those arising out of their relation to the association or corporation of which they were officers. This latter class of duties were created and defined by the articles of incorporation and by-laws of the body corporate, and related to the control and management of the enterprise which was the object of its organization ; while the former was created by the deed, and related to the property conveyed by it. Under it they were vested with the title in the property, and charged with the duty of applying it to the objects designated by the grantor, and their office in that regard would continue until the trust should be performed, even though the corporation should in the meantime have ceased to exist. Now, the trustees were not made parties to the action for the foreclosure of the mechanic's lien. As officers of the corporation, they are bound, perhaps, by the judgment against it, and would be precluded from asserting any claim in its behalf. But as trustees of the trust created by the deed they could not be bound by a judgment to which they were not parties.

Blake v. Rourke.

The sale of the property, then, is nugatory. It neither divested them of the title to the property, nor terminated the trust; and it is apparent that such a proceeding could not have the effect to cause a reversion to plaintiffs. It is equally clear that they are not entitled to the possession of the property because of the violation of the other condition in the deed, for by the express provision of that condition it is part, or, in a designated contingency, all of the proceeds of the property which is to revert to them. The property is directed to be sold and a portion of the proceeds to be given the Free-Will Baptist Church of Wilton, provided they build a church within three years from the date of the sale, and the residue, or, in case the church shall not be built within the designated time, the whole, shall go to plaintiffs. These are the conditions of the trust, and clearly they are to be executed by the trustees. Plaintiffs, then, are not entitled to the property. We have thus disposed of the case on plaintiffs' theory as to the character and effect of the deed. We will not, however, be understood as committing ourselves to that theory.

The judgment of the district court will be

AFFIRMED.

BLAKE *et al.* v. ROURKE *et al.*

1. **Will : UNDUE INFLUENCE : EVIDENCE.** In a proceeding to prove a will, where it was claimed that a son came from Kansas to influence the mind of the testator, it was proper to admit evidence having a tendency to show that his coming had another purpose.
2. **_____ : _____ : SUGGESTION OF SCRIVENER.** Where the testator deeded land to his wife, and on the same day, and as a part of the same transaction of disposing of his property, he also, at the suggestion of his scrivener, devised to his wife the same land, *held* that this fact tended to show neither undue influence nor a want of testamentary capacity.

74 519
91 481

74 519
493 601

74 519
102 360

74 519
115 486

74 519
117 746

74 519
120 841

74 519
129 97
130 186

74 519
135 137

74 519
142 174

 Blake v. Rourke.

3. ——— : INCAPACITY : BURDEN OF PROOF. Where the evidence showed only temporary mental derangement of the testator's mind, and that at times when he suffered from paroxysms of pain, it was incumbent on the contestants of the will to show that it was executed during one of such paroxysms
4. ——— : ——— : OPINIONS OF NON-EXPERTS. Non-expert witnesses cannot be allowed to give an opinion as to the mental condition of a testator on the day the will was made, when they did not see him, and could not testify to his condition, on that day.
5. ——— : ——— : RELATIVE WEIGHT OF OPINIONS OF EXPERTS. The testimony of medical men of experience in such matters, given after a careful examination of the testator's mental condition, may properly be allowed more weight and consideration by the jury than that of non-professional witnesses.

Appeal from Tama District Court.—HON. L. G. KINNE, Judge.

FILED, MAY 24, 1888.

THIS action involves the validity of a written instrument purporting to be the last will and testament of Robert Blake, deceased. There was a trial by jury, and a verdict and judgment declaring the same to be a valid will. Defendants appeal.

W. H. Stivers and J. G. Strong, for appellants.

Struble & Stiger, for appellees.

ROTHROCK, J.—I. The instrument in question was executed in due form on the eleventh day of January, 1887, and Robert Blake died on the thirtieth day of the same month. He was the owner of a farm of two hundred and forty acres, and a small tract of timber land, and his personal estate consisted of live stock and grain and necessary farm implements and machinery. His family

1. WILL : undue
influence :
evidence.

Blake v. Rourke.

consisted of his wife, one son, and five daughters. The youngest daughter was a minor, and resided with her parents. All of the other daughters were married, and doing for themselves. The will devised the two hundred and forty acres to his wife, fifteen hundred dollars to his son, five hundred dollars to the daughter who was a minor, and three hundred dollars to each of the other daughters, with the provision that, if the estate should not be sufficient to pay the three hundred dollar legacies, they should be reduced in a certain manner, and in proportions not necessary to be stated. These four adult daughters were therefore residuary legatees, and they are the parties who contest the will. The grounds upon which the contest was based were (1) that the will was procured to be made by undue influence; and (2) that Robert Blake, at the time the will was executed, did not have testamentary capacity, by reason of being of unsound mind.

The court instructed the jury that there was no evidence of undue influence, and thereby relieved the jury of considering that question. The defendants complain of this instruction. Without going into a detailed statement of the evidence, it is sufficient to say that we are fully satisfied that this instruction was correct. There is no evidence that the wife or son of the deceased, or any other person, used any arts, influence or persuasion to induce the deceased to make the will. The basis of any claim in that behalf is founded upon the fact that they were living in the house on the farm with him when the will was made. All else is grounded upon the merest suspicion. It appears that the son of the deceased removed to the state of Kansas in the fall of 1886, and that he returned a short time before the will was executed. The widow was a witness in support of the will, and she was asked if she heard any conversation between the son and his father in relation to his staying or going back. The answer to the question was that her husband "spoke something about Enoch (the son) staying. If he did not like it there he should come back home, providing Mr. Rourke would sell out to

Blake v. Rourke.

him." Rourke was the husband of one of the daughters, and had leased the farm of the deceased. It is claimed that this testimony was immaterial. It appears to us that it was proper evidence upon the issue of undue influence. It tended to show that the son did not come back from Kansas for the purpose of influencing the deceased to make a will favorable to him.

II. It appears that on the same day that the will was made deceased made a deed to his wife, in which he conveyed the farm to her absolutely.

2. —: —: suggestion of scrivener.

Immediately after making the deed, he made and executed the will in which he devised the same land to his wife. It is claimed that this avoided the will, because it was not the act of the testator, for the reason that the evidence shows that the land was put in the will at the suggestion of the person who drew the will; and the court was asked to instruct the jury that if they found such to be the fact, then they should find that the will was not valid. This instruction was correctly refused. The deed and the will were parts of one transaction. They were both in the nature of testamentary dispositions of the estate of the deceased; and the deed merely emphasizes the fact that the deceased intended that his wife should have the farm; and it was wholly immaterial whether, after making the deed, the same property was included in the will at the suggestion of his confidential adviser, whom he had called to put his wishes in regard to his estate in proper form. This fact neither tended to show a want of testamentary capacity, nor undue influence.

III. It appears from the evidence that the deceased was in feeble health for several months before his death. His attending physician testified

8. —: incapacity: burden of proof.

that "he had a complication of troubles; had prostatic trouble, kidney trouble, and all the digestive organs were involved." The evidence shows that at times he suffered great pain, and on one or two occasions in these paroxysms of pain, as one of the witnesses expresses it, "he did not know anything." It is not claimed that he had any disease of the brain

which directly affected his mental faculties. It is claimed that the complication of diseases with which he suffered so weakened his mind and intellect that, at the time the will was made, he did not have testamentary capacity. There can be no question, under the evidence, that the deceased was capable of making a valid will except at such times as he was suffering from the paroxysms of pain above mentioned. To hold otherwise would be in plain conflict with all the evidence, including even that of his attending physician, who was called as a witness by the contestants. It was therefore incumbent on the contestants to prove that the will was made while the deceased was suffering with one of these temporary derangements of the mind. It was not incumbent on the proponents of the will to prove that the mind of the deceased "was restored so as to be sound" when the will was made, as claimed by appellants in an instruction to the jury, asked and refused. The law is so well settled as to be fundamental and elementary that the rule contended for by appellants has no application where the mental derangement is merely fitful and temporary.

IV. A great many objections were made to rulings of the court upon the admission and exclusion of evidence.

They relate in part to the refusal of the court to allow non-expert witnesses to testify as to their opinion of the mental condition of the deceased on the day of the execution of the will. These rulings were correct. The witnesses were all allowed to give their opinion of his condition when they last saw him before the will was made, and this was all they could properly give an opinion upon. Other objections were to the rulings of the court upon the testimony of the parties as to personal conversations with the deceased. We have examined these objections carefully, and conclude that, under section 3639 of the Code, which excludes all such personal transactions, the rulings of the court were correct.

V. Complaint is made of an instruction to the jury which directed them that "the testimony of medical

Norris v. Hix.

5. — : — :
relative
weight of
opinions of
experts.

men of experience in their profession in this class of cases, after a careful examination of the testator's mental condition, touching the mental condition of the deceased at the time of the execution of the will in question, may be by you given more weight and consideration than the testimony of non-professional witnesses." This instruction, or, rather, one similar to it, was approved by this court in *Meeker v. Meeker*, ante, p. 352.

VI. Objections are made to other instructions and to the refusal to give instructions requested by appellants. We discover no error in these rulings. It appears to us that the instructions given by the court fully covered every point in the case, and that they correctly state the law applicable to the evidence.

VII. It is claimed that the verdict is contrary to the evidence. We think otherwise.

AFFIRMED.

NORRIS V. HIX.

74	524
83	569

74	524
94	558

74	524
109	285

74	524
114	664

1. **Chattel Mortgage : CROPS NOT YET GROWN : VALIDITY.** A mortgage of crops to be grown in the future is valid.
2. — : OF CROPS "GROWN" IN A CERTAIN YEAR : MEANING. A mortgage made in March, 1886, of "crops grown during the year 1886," will hold the crops afterwards raised in that year.
3. — : VALIDITY : OTHER SECURITY : LENIENCY TO MORTGAGOR. In an action involving the validity of a chattel mortgage, evidence offered by defendant to prove that the mortgagee had other security, and that he had permitted the mortgagor to sell some of the chattels and convert the proceeds, was properly excluded as immaterial.
4. — : ENFORCEMENT BY MORTGAGEE : DEBT ASSIGNED : PARTIES. The fact that the note secured by a chattel mortgage bears an assignment on its back will not defeat an action to enforce the mortgage, where it appears that the assignment was made to secure a debt which has been paid, and that the plaintiff is now the owner of the debt.

Norris v. Hix.

5. **New Trial: NEWLY-DISCOVERED EVIDENCE: LACHES.** After a verdict had been rendered for the value of a lot of oats, defendant had them weighed, and found that they were of less value than found by the jury. *Held* that, as this newly-discovered evidence of their value was ascertainable before the trial, it was no ground for a new trial.

Appeal from Story District Court.—HON. D. D. MIRACLE, Judge.

FILED, MAY 24, 1888.

ACTION for the recovery of specific personal property. Judgment for plaintiff. Defendant appeals.

Dyer & Fitchpatrick and J. F. Martin, for appellant.

C. H. Balliet, for appellee.

REED, J.—The property in controversy is a quantity of oats raised by John Reeve in the year 1886. On the eleventh day of March of that year, Reeve executed to plaintiff his promissory note for fifteen hundred dollars, and to secure the same gave a chattel mortgage on “all crops of every kind and description grown, during the year 1886, on the following premises, to-wit, the northeast quarter of section twenty-eight (28), and the east half of the southwest quarter of the northeast quarter, and the northeast quarter of the southeast quarter, of section twenty-one (21), in township 84, range 21, Story county.” On the twelfth of May following, he executed to the First National Bank of Nevada his promissory note of three hundred and thirty dollars, and to secure the same gave a chattel mortgage on all personal property and crops on the same premises. That mortgage, however, provides that it shall be subjected to all other liens on the property. The oats in question were grown on the premises described in the mortgages, but they were sown after plaintiff’s mortgage was executed. After they were harvested and threshed, defendant, who was then the

Norris v. Hix.

owner of the second mortgage, seized them under that mortgage. In addition to a general denial, he pleaded that plaintiff's mortgage was without consideration; that it was given for the fraudulent purpose of hindering and delaying creditors; and that the debt secured by it had been fully paid.

I. The district court ruled that plaintiff would be entitled to recover upon proof that his mortgage was given as security for an existing debt, and that some portion of the debt remained unpaid, unless the allegation of fraud was established. The exceptions urged by counsel to that ruling are: (1) That, as the property was not *in esse* when the mortgage was given, it was not the subject of sale, and consequently the instrument was void from the beginning; and (2) the description contained in the mortgage, to-wit, "all crops grown, during the year 1886, on the * * * premises," does not cover or include crops not then planted or grown. The first objection is disposed of by the holding of this court in *Wheeler v. Becker*, 68 Iowa, 723; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Brown v. Allen*, 35 Iowa, 306; and other cases. We think, also, that the second objection is not well taken. If the language of the description

1. CHATTEL mortgage: crops not yet grown: validity.

2. —: of crops "grown" in a certain year: meaning.

were to be taken literally, and the interpretation was not aided by the circumstances, perhaps the position of counsel could be maintained. Literally, the words made use of are descriptive of crops already grown, rather than those to be grown; and, if the instrument had been executed near the end of the year, that meaning would be attributed to them. But every one knows that crops could not have been grown on the premises, in the year 1886, before the date of the mortgage, and it is absolutely certain that the parties never intended that it should cover crops then grown. The rule, generally expressed, undoubtedly is that "a chattel mortgage will not be deemed to cover after-acquired property, unless the intention that it should is clearly expressed." Jones, Chat. Mortg. sec. 160; *Lormer v. Allyn*, 64

Norris v. Hix.

Iowa, 726; *McArthur v. Garman*, 71 Iowa, 34. But that rule is applicable to cases where the language of the instrument is capable of application to property in possession at the time, and it ought not to obtain where its effect would be to defeat the manifest intention of the parties, as gathered from the language, and aided by the circumstances under which it was used, which would be its effect in this case if we were to hold it applicable; for it is manifest that it was the intention of the parties that the mortgage should cover the crops to be grown on the premises during that year. There was no other subject to which it possibly could have applied.

II. The court excluded evidence offered by defendant to prove that plaintiff had other security than the mortgage for the debt; also that he had permitted Reeve to sell some of the mortgaged property, and convert the proceeds.

3. —: validity:
other secur-
ity: leniency
to mortgagor.

The rulings are correct. It could make no difference that plaintiff had other security. His mortgage, if valid, gave him the right to the possession of the particular property in question, regardless of whether he had other security or not. Nor would his right of possession be defeated by the fact that he had waived or relinquished his lien on other portions of the property.

III. An assignment of plaintiff's note and mortgage to Briggs & King was indorsed thereon. Defendant moved the court to direct a verdict in his favor on the ground that it was shown by the assignment that plaintiff was not the owner of the note and mortgage, and consequently was not entitled to the possession of the property, but the motion was overruled. This ruling is also correct. The evidence showed that Reeve was indebted to Briggs & King, and that plaintiff was his surety, and the note and mortgage were assigned to them as additional security. That debt, however, had been paid; and Briggs & King, on its payment, delivered the instruments back to plaintiff. The effect of the assignment was to divest plaintiff of the title to the securities. But

4. —: enforce-
ment by mort-
gage: debt
assigned:
parties.

The State v. Keasling.

when the object of the assignment was accomplished, and they were delivered back to him, he again became the owner of them, and entitled to all the rights which accrued under them.

IV. The verdict determined the value of the property, and plaintiff elected to take a money judgment for the amount. One of the grounds of the motion for a new trial is that, since the verdict, defendant had caused the oats to be weighed, and that the quantity, as ascertained by weighing, was less than was shown by the evidence on the trial, and consequently was of less value than found by the jury. But this affords no ground for a new trial. The evidence of the fact was as attainable before as after the trial. It was defendant's fault that it was not produced upon the trial, and the courts will not grant a party a new trial simply to afford him an opportunity to introduce evidence which was attainable, and could have been introduced, on the first trial.

We find no error in the record, and the judgment will be **AFFIRMED.**

THE STATE V. KEASLING.

1. **Assault With Intent to Murder : REQUISITES OF INDICTMENT.** The elements of the crime of assault with intent to commit murder are (1) the assault; (2) the specific intent to kill; and (3) malice aforethought; and an indictment which charges these is sufficient, even though the facts alleged are not such that, if death had resulted, the crime would have been murder in the first degree.
2. ———: **VERDICT OF GUILTY AS CHARGED : SENTENCE FOR LESSER OFFENSE.** In such case, where the verdict was guilty of the offense charged, but the court was of the opinion that malice aforethought had not been proved, but that the other elements of the offense had been, constituting the crime of assault with intent to commit manslaughter, the defendant was not on that ground entitled to a new trial, but was properly sentenced for the lesser included offense. (*State v. Schele*, 52 Iowa, 608, *followed*.) [ROBINSON, J., *dissenting*, and SEEVERS, C. J., thinking this point not necessarily involved, neither concurring nor dissenting.

74	528
81	618
74	528
97	382
74	528
107	606
74	528
120	248
74	528
129	266
74	528
133	163

The State v. Keasling.

8. ———: SELF-DEFENSE: RIGHT AND WRONG RULE STATED IN INSTRUCTION: NEW TRIAL. In this case, in a lengthy instruction, the court, in one part of it, erroneously laid down the rule that the right to take life, or to resort to the use of a deadly weapon in resistance of an assault, depends on whether the assault is in fact felonious, and the danger actual and urgent. In another part the correct rule was stated. *Held* that the verdict of guilty should be set aside, because it cannot be known which rule the jury followed. (*State v. Shelton*, 64 Iowa, 333, followed in principle.)

Appeal from Keokuk District Court.—HON. W. R. LEWIS, Judge.

FILED, MAY 24, 1888.

THE defendant was convicted by the verdict of a jury of the crime of assault with intent to commit murder. The district court overruled his motion for a new trial, and pronounced judgment against him, imposing a term of imprisonment in the penitentiary. The judgment entry contains the following recital: "And the court, however, finding on trial that there is no evidence sufficient to warrant conviction of defendant of the crime of assault with intent to commit murder, but that the verdict is sufficiently supported by the evidence to sustain conviction for the crime of assault with intent to commit manslaughter, inflicts no more than the penalty for this crime." The defendant appeals.

Mackey & Fonda, for appellant.

A. J. Baker, Attorney General, for the State.

REED, J.—I. The following is a copy of the indictment: "The said Mathias Keasling, at the county of Keokuk," etc., "on the fifteenth day of November, 1886, did then and there, with a certain pistol, the particular description of which is to the grand jury unknown, the said pistol being loaded and charged with gunpowder and leaden balls, the said pistol being a dangerous and deadly weapon with which the said Mathias Keasling

1. ASSAULT with
intent to
murder:
requisites of
indictment.

The State v. Keasling.

was armed, and the said Mathias Keasling did then and there unlawfully, deliberately, feloniously, and with malice aforethought, make an assault in and upon one John Ruby, and did then and there unlawfully and feloniously shoot off and discharge the contents of said pistol at, against, into, and through the arm of said John Ruby, with a felonious intent then and there to kill and murder the said John Ruby, contrary to and in violation of law." It was contended that this indictment does not charge all of the elements of the crime of assault with intent to commit murder, and that the court therefore erred in putting defendant on trial for that offense. It is true, doubtless, that, with the additional averment that the wound inflicted by defendant was mortal, and that death had resulted therefrom, the indictment would not have been sufficient as an indictment for murder of the first degree. *State v. McCormick*, 27 Iowa, 402; *State v. Watkins*, 27 Iowa, 415. The position of counsel is that, to constitute the crime of assault with intent to commit murder, the facts must be such that, if death had resulted, the crime would have been murder of the first degree; and this view was expressed by the district court in one of the instructions to the jury. But the position is not correct. Murder is the killing of a human being with malice aforethought, express or implied. Code, sec. 3848. Murder perpetrated by means of poison, or lying in wait, or when the killing is wilful, deliberate and premeditated, or is committed in the perpetration, or attempt to perpetrate, certain named felonies, is of the first degree, while murder otherwise committed is of the second degree. Secs. 3849, 3850. Wilfulness, or an intent to kill (except when the crime is committed in the perpetration or attempted perpetration of some of the felonies named), is an element of murder of the first degree. But the crime is not necessarily of that degree because the killing was wilful; for the elements of deliberation and premeditation may have been wanting, each of which is an essential element of that crime. An indictment charging a wilful killing, with malice aforethought,

The State v. Keasling.

would be good as an indictment for murder, but not for murder of the first degree. The crime denounced by section 3872 (under which this indictment was found) is assault with intent to commit murder. An intent to commit murder necessarily includes a specific intent to kill; but neither deliberation nor premeditation is an essential element of that crime, for neither is essential to murder. The elements of the crime are (1) the assault; (2) the specific intent to kill; and (3) malice aforethought. Each of these elements is charged in the indictment. In order, therefore, to sustain it as an indictment for assault with intent to commit murder, it is not necessary to go as far as this court went in *State v. Newberry*, 26 Iowa, 467, where it was held that an intent to commit murder necessarily comprehended all the elements of murder, and that an averment¹ that the assault was with the intent to kill and murder was equivalent to charging that it was committed with malice aforethought.

II. It was contended that, when the court determined that the verdict of guilty of assault with intent to commit murder was not sustained, the defendant, as matter of right, was entitled to a new trial. But he could properly be convicted, under this indictment, of any offense less than that charged in express terms which is necessarily included in that charged. The verdict implies a finding by the jury (1) that defendant's act in firing the shot was unlawful; (2) that he committed the act with the intent to take the life of Ruby; and (3) that the act was committed with malice aforethought. But the court was of opinion that, while the finding as to the first of the two facts was sustained by the evidence, the element of malice aforethought was not proven. But that is not an element of assault with intent to commit manslaughter. Every element of that crime is found in the first two facts. As it is included in the charge, and as the verdict necessarily determines that defendant is guilty of that offense, judgment could properly be

2. —: verdict of guilty as charged: sentence for lesser offense.

The State v. Keasling.

pronounced against him, notwithstanding the determination that the finding as to the third fact was not sustained. The question is not different from that determined in *State v. Schele*, 52 Iowa, 608.

III. Defendant claimed that Ruby was the aggressor in the transaction, and that he was acting in the reasonable and lawful defense of his own person when he fired the shot. On the subject of self-defence, the court gave the following instruction:

8. —: self-defense: right and wrong rule stated in instruction: new trial.

“The law regards human life as the most sacred of all interests committed to its protection, and there can be no successful setting up of self-defense, *unless the necessity for taking human life, or assaulting with a weapon in a manner likely to produce death or great bodily injury, is actual, present, urgent—unless, in a word, the taking of his adversary's life, or making such assault upon him, is the only reasonable resort of the assailed to save his own life or his person from dreadful harm or severe calamity felonious in its character.* You should ascertain whether all the circumstances in evidence denote or show that Ruby intended to take the life of the defendant, or do him some enormous or dreadful bodily harm; or whether, from all the circumstances at the time surrounding the parties and attending the transaction, this was, to the defendant's reasonable apprehension, Ruby's intention. And if you so find that it was Ruby's intention, or whether it was, in fact, so or not, if to defendant's reasonable apprehension it was so, then defendant, in self-defense, might lawfully take the life of the assailant, or assault him with a weapon and in a manner likely to cause death.”

The portion of the instruction which we have italicised is erroneous. Under it the right to take life, or to resort to the use of a deadly weapon in resistance of an assault, is made to depend on whether the assault is, in fact, felonious, and the danger actual and urgent. It can make no difference as to the effect of the instruction that the true rule is subsequently laid down, for with two conflicting and inconsistent rules given them for

The State v. Keasling.

their guidance, it can never be determined which the jury obeyed, or under which the verdict was found. In *State v. Shelton*, 64 Iowa, 333, we reversed the judgment for the reason that the trial court had given two inconsistent instructions to substantially the same effect.

Complaint is made of certain other instructions given by the court. Without setting these out, we deem it sufficient to say that we find no prejudicial error in them. One on the subject of circumstantial evidence might well have been omitted, as all the evidence in the case was of a direct character. But we can hardly conceive that defendant could have been prejudiced by it. For the error pointed out, the judgment must be

REVERSED.

ROBINSON, J. (*dissenting*).—I agree to the conclusion reached in the foregoing opinion, that the judgment of the district court should be reversed, but am unable to assent to the doctrine announced in its second division. The only authority which has been cited as sustaining it is the case of *State v. Schele*. That case seems to stand alone; and, if correct, it must be because of its peculiar facts. It seems to me that the right to a trial by jury in a criminal case necessarily includes the right to have the jury determine the offense of which they find the accused guilty. In cases where the offense charged does not include different degrees, a verdict of “guilty as charged” sufficiently designates the offense; but, where the indictment charges an offense consisting of different degrees, it is the statutory right and duty of the jury to designate the degree of the offense of which the accused is guilty. Code, secs. 4465, 4466. It is a general rule of practice, not only approved, but absolutely required, by numerous decisions of this court, for the trial court to instruct the jury fully in regard to the different degrees of the same offense, of one of which the person on trial may be convicted. *State v. Vinsant*, 49 Iowa, 243; *State v. Clemons*, 51 Iowa, 279; *State v. Glynden*, 51 Iowa, 465. In none of these cases was the right of the trial court to render

Taylor v. Branscombe.

judgment for the punishment authorized for the offense which it found the evidence had established even suggested. On the contrary, this court said in *State v. Clemons, supra*, that "the degree of the crime is to be determined by the jury, and not by the court, and there can be but one rule in all cases." This seems to me to announce the correct rule. It will not do to say that defendant was not prejudiced because the punishment inflicted was not so great as that authorized by the verdict of the jury. It was his constitutional and statutory right to be tried, and to have his offense determined, by a jury, and to be made liable to that punishment only which their verdict showed to be authorized by law. If that verdict was contrary to the evidence, it was the duty of the court to set it aside and grant a new trial. Code, sec. 4489, par. 6. In my judgment, a court cannot inflict punishment in a case tried to a jury for an offense, or a degree of an offense, not designated by the verdict, without usurping a prerogative of the jury.

SEEVERS, C. J. (*concurring*).—I concur in the result reached in the foregoing opinion, but I neither assent to nor dissent from the rule stated in the second paragraph of the opinion of the court, because it is unnecessary to do so.

TAYLOR V. BRANSCOMBE *et al.*

1. **Actions and Parties: JOINDER: SUBJECTING PROPERTY HELD BY WIFE TO HUSBAND'S DEBT.** Plaintiff held a judgment against one of the defendants, rendered in Kansas. The other defendant was his wife, to whom he had conveyed land in Iowa without consideration. *Held* that plaintiff might maintain an action in chancery against both defendants, who were non-residents, for the purpose of obtaining judgment against the husband, upon the Kansas judgment, and of subjecting the land standing in the wife's name to the payment of the judgment so obtained; since it often happens, in actions in chancery, that the same relief is not sought or granted against all the parties joined as defendants.

74	534
89	158
74	534
91	413
74	534
92	428
74	534
95	676
74	534
106	739
74	534
115	55
115	478
74	534
124	598

Taylor v. Branscombe.

2. **Fraudulent Conveyance : FACTS CONSTITUTING.** Plaintiff loaned to one of the defendants, who was his son-in-law, large sums of money, supposing him to have considerable wealth, but when he came to demand payment, he found that he was insolvent, and that he had conveyed his land to his wife. The evidence shows that this conveyance was made, as between the parties thereto, for the purpose of defrauding the plaintiff. *Held* that it should be set aside, even though plaintiff, before he knew of the insolvency, and when he supposed the husband to have ample means, requested such conveyance to be made for the purpose of securing the property to his daughter.

Appeal from Palo Alto District Court.—HON. GEORGE H. CARR, Judge.

FILED, MAY 24, 1888.

ACTION in chancery to recover a judgment against one of the defendants, and to set aside for fraud a deed made by that defendant to the other defendant, and to subject the land therein conveyed to the judgment. There was a decree granting the relief prayed for by plaintiff. Defendants appeal.

Harrison & Jenswold, for appellants.

A. F. Call and Geo. E. Clarke, for appellee.

BECK, J.—I. It is first insisted by defendants that the action cannot be maintained, for the reason that there is a misjoinder of causes of action and of defendants. The defendants are husband and wife. The plaintiff recovered a judgment against the husband in Kansas for money loaned and advanced to him by plaintiff. The plaintiff in this action seeks to recover against the husband on this judgment, and caused an attachment to be issued and levied upon certain lands which had been conveyed by the husband to the wife. The petition alleges that the conveyance was made without consideration, in order to defeat the collection of plaintiff's claim, and is therefore void. In the

1. **Actions and parties:**
joinder:
subjecting
property held
by wife to
husband's
debt.

Taylor v. Branscombe.

case of a conveyance of real estate to defraud a creditor, the grantee is regarded by the law as holding the title in trust for the grantor, to be applied in payment of his debt. As to the creditor, the law regards the debtor as a *cestui que trust*, having an interest in the trust property which may be attached in any civil action. Code, sec. 2949; *Blaney v. Hanks*, 14 Iowa, 400; *Lathrop v. Brown*, 23 Iowa, 40; *Cook v. Dillon*, 9 Iowa, 407; *Crosby v. Elkader Lodge*, 16 Iowa, 399. The grantor in a deed fraudulently made to defeat a creditor is a proper party defendant in an action to subject the property conveyed to the claim of the creditor. *Potter v. Phillips*, 44 Iowa, 353. The attachment, having been lawfully issued, was a lien upon the property attached for the security of plaintiff's claim, which may be enforced by a creditor's bill against the lands fraudulently conveyed. See cases cited in 3 Pom. Eq. Jur., notes to sec. 1415. It has been held that a creditor's bill may be maintained, without judgment or attachment, in case the debtor is a non-resident, as were defendants in this case. *Pope v. Solomons*, 36 Ga. 541; *Peay v. Morrison's Ex'rs*, 10 Grat. 149; *Scott v. McMillen*, 1 Litt. 302; *Kipper v. Glancey*, 2 Blackf. 356. The rule that a creditor's bill may be maintained before judgment, but after the lands have been seized under an attachment, has been recognized by the practice of the courts of this state in cases within our memory.

II. The husband, as we have seen, is a proper party to be joined with the wife in this action. In addition to the relief sought against him and the wife jointly, judgment is sought against him personally upon plaintiff's claim. But this is not a ground of objection to the action. It often happens, in actions in chancery, that the same relief is not sought or granted against all the parties joined as defendants. The cases cited by defendants' counsel are not in conflict with these conclusions.

III. The plaintiff is the father of the defendant Mrs. Branscombe. He loaned and advanced large sums

Taylor v. Branscombe.

2. FRAUDULENT
conveyance:
facts consti-
tuting.

of money to the other defendant, her husband, which constituted about all of the father's property. The husband was supposed by him to have considerable wealth. When the plaintiff demanded payment, he discovered that the husband was insolvent, and had conveyed, without consideration, the lands involved in this suit, to his wife. This conveyance both husband and wife testify was made at the request of plaintiff for the purpose of securing the property to the wife. We think it cannot be doubted that, even if such a request were made, the plaintiff did not intend that the husband should thereby put it out of the power of plaintiff to enforce the collection of the claim. If made, it was in the belief and with the understanding that the husband was possessed of ample means; and we think the evidence authorizes the conclusion that the intention of the defendants was not to secure the property to the wife, but to defeat the collection of plaintiff's claim. We have no doubt that if the husband had been solvent, and had therefore no necessity to resort to fraud to conceal his property, the deed to the wife would never have been made. The history of the parties, and the facts of the case as disclosed by the evidence, lead us to the conclusion that the loans were obtained from plaintiff by the husband under false representations, and that he and his wife united in the purpose to hold the property free from the claim of plaintiff. The evidence clearly discloses their fraud and selfishness, and demands that plaintiff have the relief given him by the district court. The judgment is therefore

AFFIRMED.

Craig v. Hasselman.

CRAIG V. HASSELMAN *et al.*

Intoxicating Liquors: NUISANCE: PLEADING: DENYING RESIDENCE OF PLAINTIFF. In an action to abate a liquor saloon as a nuisance, where plaintiff shows his right to maintain the action by alleging that he is a citizen of the county, such allegation is not put in issue by a general denial, nor by (what amounts to the same thing) a denial of knowledge or information sufficient to form a belief as to the truth of the averment. (Compare *Littleton v. Harris*, 78 Iowa, 161.)

Appeal from Des Moines District Court.—HON.
CHARLES H. PHELPS, Judge.

FILED, MAY 25, 1888.

ACTION in equity to abate a nuisance alleged to be maintained in the keeping of a saloon or dramshop. There was a decree in the district court for the defendants. Plaintiff appeals.

Newman & Blake, for appellant.

P. Henry Smyth & Son, for appellees.

ROTHROCK, J.—I. The plaintiff, as showing his capacity to maintain the action, averred that he was, and for many years had been, a citizen and resident of Des Moines county, Iowa. The defendant answered this averment of the petition as follows: "As to whether plaintiff is, or for many years has been, a citizen of Des Moines county, defendant has no knowledge or information sufficient to form a belief, and therefore leaves plaintiff to his proof." This form of answer is authorized by section 2655, of the Code. It presents precisely the same issue as a general denial of the averments of the petition. The plaintiff, if a resident and citizen of the county, is authorized by law to maintain

The State v. Rainsbarger.

the action ; and a general denial of residence and citizenship raises no issue. This defense should be specially pleaded, as that the defendant was neither a native-born nor a naturalized citizen, or that he was a resident of some other named county or place. See *Littleton v. Harris*, 73 Iowa, 161 ; Code, sec. 2717. There was therefore no necessity for the plaintiff to make proof of his citizenship or residence.

II. The cause appears to have been tried upon its merits, and is here for trial anew. It is claimed that the evidence shows that the defendants maintained and kept the saloon as alleged in the petition. An examination of the record and evidence leads us to the conclusion that the position of plaintiff's counsel must be sustained. We think the court below must have been of opinion that the plaintiff was not entitled to a decree, because it was not shown by sufficient evidence that he was a citizen of the county.

The fact of the keeping of the saloon appears to us to be established by a clear preponderance of the evidence. There are other questions discussed by counsel which we do not deem it necessary to consider. The decree of the district court will be reversed. The plaintiff asks that a final decree be entered in this court in accord with the prayer of the petition. It is so ordered.

REVERSED.

THE STATE *et al.* v. RAINSBARGER.

1. **Costs :** IN CRIMINAL CASE : MADE BY DEFENDANT ON APPEAL : LIABILITY OF COUNTY. Where an indictment was found in one county, and a judgment of conviction was had in another county on a change of venue, and defendant appealed to this court, and the judgment was reversed and the cause remanded, *held* that an order taxing to the county where the trial was had the costs made by defendant on appeal was without authority of any statute, and was void, and should therefore have been set aside upon motion of such county. (Compare *Red v. Polk County*, 56 Iowa, 98.)

74	539
81	508
74	539
92	259
74	539
106	41

The State v. Rainsbarger.

2. ——— : ——— : TAXATION TO COUNTY: WHO MAY APPEAL. The state, which is plaintiff in a criminal case, and the county to which costs therein are taxed, are both entitled to appeal from the order taxing the costs to the county, and the defendant cannot have one of the appeals dismissed when it does not appear that he will be prejudiced by allowing them both to stand.
3. ——— : TAXATION: EXCEPTIONS. Exceptions duly taken to an order overruling a motion to retax costs bring up the question as to whether they were properly taxed, without any exception to the order taxing the costs.

Appeal from Marshall District Court.—HON. JOHN L. STEVENS, Judge.

THE county attorney of Marshall county moved to retax certain costs taxed against Marshall county in the case of *The State of Iowa v. Nathan Rainsbarger*. The motion was overruled, and the state and county both unite in an appeal to this court.

W. W. Miller, County Attorney, for appellants.

Brown & Carney, for appellee.

BECK, J.—I. The defendant was convicted upon an indictment found in Hardin county for murder, and, upon an appeal to this court, the judgment was reversed and the cause was remanded upon *procedendo* for a new trial. Thereupon, on defendant's motion, the following costs, incurred upon the appeal, were taxed in the case and ordered to be paid by Marshall county:

1. Costs: in criminal case: made by defendant on appeal: liability of county.

1. Maps for abstract.....	\$ 4 00
2. Transcript by short-hand reporter.	148 25
3. Abstract, 213 pages, \$1.00 per page.	213 00
4. Argument, 43 pages, \$1.00 per page	43 00
5. Reply, 18 pages, \$1.00 per page. ..	18 00
6. Transcript by Clerk S. R. McLeran	38 40

Total.....\$464 65"

Counsel for the state raised no question as to the sixth item. Having been paid by Hardin county, as

they claim, it is not considered upon this appeal. Subsequently the county attorney moved to retax these costs, and to disallow the same, as they were not required by law to be paid by the state or county. By another motion the county attorney asked that the record taxing the costs be corrected so that it would contain no requirement upon Marshall county to pay the costs. This motion was based on the ground that the law did not authorize the judgment. It was also overruled. Exceptions to these rulings were duly taken.

II. In our opinion both motions should have been sustained. Our attention has been directed to no statute requiring or authorizing costs of this character incurred in the prosecution of an indictment to be taxed to the state or county. In *Red v. Polk County*, 56 Iowa, 98, this court held that similar costs could not be recovered against the county wherein the indictment was found, the accused having been discharged after a judgment of conviction was reversed by this court. The plaintiff in that case relied upon Code, section 3790; but we held that it imposed no liability upon the county.

III. Counsel for the defendant cite Code, section 4381, to sustain the order taxing the costs in question. It is in the following language: "Sec. 4381. In all changes of venue, under the provisions of this chapter, the county from which the change of venue was taken shall pay the expenses and charges of removing, delivering and keeping the defendant, and all other expenses necessary and consequent upon such change of venue and the trial of such defendant, which shall be audited and allowed by the court trying such case." It will be observed that this section does not declare that costs made by defendant shall be paid by the county. It simply provides that the county from which the cause is taken upon change of venue shall pay expenses attending the change of venue. There is no provision as to defendant's costs.

IV. Code, section 3841, is also cited; but it simply

The State v. Rainsbarger.

provides that, when costs are paid by the county where the trial is had, they shall be charged to the county wherein the indictment was found. Not one word is found here charging either county with costs made by the person indicted. And no provision of the statutes has been referred to which has this effect. It may be that the correct administration of criminal justice demands such a provision. If it be so, it is a *casus omissus*, which we cannot supply.

V. As there is no law authorizing the taxation of the costs against the county, the order to that effect was made without jurisdiction, and is void. It is not, therefore, an adjudication binding the county. It was proper for the court upon the motions to correct its action, so that this void order would not appear of record.

VI. Counsel for defendant moved to strike certain affidavits filed in support of the motions to retax costs, and correct the order requiring their payment by Marshall county. If these affidavits be disregarded, we would reach the conclusion above announced, for the character of the costs is plainly shown in other parts of the record. We need not, therefore, rule on the motion.

VII. It appears that separate appeals were taken from the original order taxing the costs, and from the orders overruling the motion to retax and to correct the judgment. Of this defendant <sup>2. — : — :
taxation to
county : who
may appeal.</sup> complains. No prejudice results to defendant if both appeals are permitted to stand, as no additional costs are made, and nothing is thereby done to impede or prevent the just decision of the questions of law and fact arising in the case. The state, being the plaintiff in the case wherein the erroneous taxation of costs was made, may appeal therefrom; and the county, being charged with the costs, may also appeal. Defendant's motion to dismiss the state's appeal is overruled.

VIII. No exceptions to the original order of taxation of the costs were taken; but exceptions were

Beach v. Donovan.

2. — : taxa- taken to the order overruling the motion to
tion : excep- retax the costs, and to the judgment against
tions. Marshall county for the costs. These
exceptions bring before us the questions in the case.

IX. It is urged that the assignments of error are insufficient; but they are sufficiently directed against the order overruling the motion to retax the costs, and the judgment against the county, the very adjudications of which complaint is made.

No other questions arise in the case. The judgment of the district court is

REVERSED.

BEACH V. DONOVAN *et al.*

Appeal : LESS THAN ONE HUNDRED DOLLARS : REQUISITES OF CERTIFICATE OF TRIAL JUDGE. In a case involving less than one hundred dollars, it is not sufficient, to give this court jurisdiction, for the trial judge to certify certain questions upon which he says it is desirable to have the opinion of the court. It is necessary also to certify that the questions are involved in the determination of the case.

Appeal from Franklin District Court.—HON. JOHN L. STEVENS, Judge.

FILED, MAY 25, 1888.

ACTION at law for the recovery of the price of an organ. Verdict and judgment for plaintiff, and defendants appeal.

J. H. Scales, for appellants.

Daniel Eiler, for appellee.

REED, J.—The amount in controversy is less than one hundred dollars. The trial judge signed the following certificate: "I, J. L. Stevens, judge of the eleventh judicial district of Iowa, certify the following questions upon which it is desirable to have the opinion

74	543
84	579
74	543
90	525
74	543
91	343
74	543
94	200
74	543
96	734

Beach v. Donovan.

of the supreme court." This is followed by four questions, but there is no averment that the cause involves the determination of either of them. The statute (Code, sec. 3173) provides that "no appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall certify that the cause involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court." To give this court jurisdiction in a case of this kind, it is essential that it be shown by the certificate that the cause involves the determination of the questions stated. It can readily be determined from the pleadings in the case that the questions certified might have arisen under them; but whether they did arise, and whether the cause involves their determination, can only be determined from an examination of the evidence. But jurisdiction is conferred by the certificate, and not by the pleadings or evidence. *Curran v. Excelsior Coal Co.*, 63 Iowa, 94. We have sometimes held that we would go back of the certificate, and determine, from an inspection of the record, whether the cause did involve the determination of the questions stated. See *Swails v. Cissna*, 61 Iowa, 693; *McLenon v. Kansas City, St. J. & C. B. Ry. Co.*, 69 Iowa, 320. But in those cases the certificates on their face were sufficient to confer jurisdiction, and we went into the record for the purpose of determining whether the cause in fact involved the determination of the questions propounded; while in this the fact essential to the jurisdiction is not stated. The appeal will therefore be

DISMISSED.

THE STATE V. TROUT.

74	545
119	661
119	662

1. **Murder : INSANITY AS DEFENSE : BURDEN OF PROOF.** The court instructed the jury as follows: "When the state shows beyond reasonable doubt, in the first instance, that the defendant is guilty, then defendant comes to his plea of insanity; and, when he comes to rely on such plea, then, under the law, he is required, in order to excuse his act on account of the alleged insanity, to show by a preponderance of the evidence,—that is, by the greater weight of credible evidence in the case,—that he was insane." *Held* correct, and that the court was not required to give another instruction to the effect that, if insanity was made probable by the evidence, defendant should be acquitted. (Compare *State v. Jones*, 64 Iowa, 856.)
2. **—— : IMPRISONMENT FOR LIFE : FORM OF VERDICT.** Where the court instructed the jury that, if they found defendant guilty of murder in the first degree, they should determine whether he should be punished by death, or by imprisonment for life at hard labor in the state penitentiary, and they found him guilty, and that he "should be punished by imprisonment in the penitentiary for life," *held* that the omission of the words "at hard labor" did not render the verdict fatally defective, but that defendant was properly sentenced to imprisonment for life at hard labor.

Appeal from Woodbury District Court.—HON. C. H. LEWIS, Judge.

FILED, MAY 26, 1888.

DEFENDANT was convicted of the crime of murder in the first degree, committed on or about the third day of July, 1886, in Sioux City, by shooting one Edward Hatch. The shooting by defendant, and the death of Hatch as a result thereof, are not denied; but it is claimed that defendant was insane when he fired the fatal shot, and that, therefore, he should have been acquitted. A motion for a new trial was overruled, and judgment rendered requiring that defendant be imprisoned in the state penitentiary at Anamosa for life at hard labor. Defendant appeals.

J. N. Weaver, for appellant.

A. J. Baker, Attorney General, for the State.

ROBINSON, J.—This case was submitted on a voluminous transcript of the record, without an abstract, without any assignment of errors or argument of counsel, and with the citation of but a single authority. In this condition of the case, we have examined the record with care, for the purpose of ascertaining what errors, if any, had been committed in the district court, and the grounds upon which defendant relies for a reversal of the judgment.

I. The defendant asked the court to give the jury the following instruction :

“While, in this case, the sanity of the defendant at the time of shooting Hatch, the deceased, is presumed by the law, and the burden of proving insanity rests upon defendant, still if you believe from the evidence that, at the time of such shooting, it is probable that defendant was insane, then the presumption of sanity is overcome, and defendant is entitled to an acquittal.”

The court refused this instruction, but charged the jury as follows :

“When the state shows beyond reasonable doubt, in the first instance, that the defendant is guilty, then defendant comes to his plea of insanity ; and, when he comes to rely upon such plea, then, under the law, he is required, in order to excuse his act on account of the alleged insanity, to show, by a preponderance of the evidence,—that is, by the greater weight of credible evidence in the case,—that he was insane.”

Other portions of the charge, which we need not set out, further explained the paragraph quoted. The charge given was as favorable to defendant as was the instruction he asked. In legal effect, if a claim is made probable by the evidence, it is for the reason that the

The Town of Waukon v. Strouse.

preponderance of the evidence is in favor of the claim. The case of *State v. Jones*, 64 Iowa, 356, cited by appellant, is not against this conclusion; but, on the contrary, sustains it. The charge to the jury as to the issue of insanity was in accord with numerous decisions of this court, and was, we think, correct.

II. The court instructed the jury as to the necessary elements of murder in the first degree, and that it was punishable with death, or with imprisonment for life at hard labor in the state penitentiary, as determined by the jury.

2. — : imprisonment for life : form of verdict.

The body of the verdict returned by the jury was in words following: "We, the jury, find the defendant, George Trout, guilty as charged, that is, guilty of murder in the first degree; and we say that he should be punished by imprisonment in the penitentiary for life." It was insisted in the district court that the verdict was fatally defective, and insufficient to authorize a judgment against defendant, for the reason that it neither authorized the punishment of death, nor imprisonment for life at hard labor in the penitentiary. The objection was founded upon the omission of the words "at hard labor" from the verdict. The law recognizes but two punishments for the offense of which defendant was convicted, and it was the duty of the jury to designate which of these punishments should be inflicted. While the verdict was not so complete as it might have been, yet it indicates beyond question which of the only two punishments authorized in this case it designed to have adjudged.

We discover no error in the record, and the judgment of the district court is therefore

AFFIRMED.

THE TOWN OF WAUKON V. STROUSE.

1. **Pleading : REPETITION OF PLEA AFTER DEMURREE : PRACTICE.** Where a party pleads over after a demurrer to his plea has been sustained, and his amended pleading is the same in substance as the original, a motion to strike it from the files should be sustained.

74 547
83 267

74 547
88 700

74 547
91 298

74 547
94 198

74 547
97 133
99 623

74 547
121 554

The Town of Waukon v. Strouse.

2. **Assignment of Errors: RULINGS ON DEMURRER: EXACTNESS.**
 Where a demurrer assailing a petition on several distinct grounds is sustained, an assignment of errors thereon, by simply stating that the court erred in sustaining the demurrer, is too general, under section 8207 of the Code, to raise any question for the determination of this court. (See cases cited in opinion).

Appeal from Allamakee District Court.

FILED, MAY 26, 1888.

THIS is a civil action by which plaintiff seeks to recover of the defendant (an alleged transient merchant) the sum of seventeen hundred and fifty dollars for selling goods within the incorporated town of Waukon without a license, and in violation of an ordinance of said town. A demurrer to the petition was sustained. The plaintiff amended its petition, and the defendant moved to strike out the first count thereof because it had been held bad on demurrer to the original petition. A demurrer to the second count of the amended petition was sustained. Plaintiff appeals.

A. G. Stewart and H. H. Stilwell, for appellant.

Noble & Updegraff and Dayton & Dayton, for appellee.

ROTHROCK, J.—I. The motion to strike was well taken. The grounds of recovery in the first count of the amended petition were substantially the same as in the original petition. Where a party pleads over after a demurrer to his pleading has been sustained, and his amended pleading is the same in substance as the original, the other party is not required to again demur. So far as that count is involved, the question is adjudicated, and the amended pleading presents no question nor case for the court to determine, and it should be stricken from the files.

1. PLEADING:
 repetition of
 plea after
 demurrer:
 practice.

II. The demurrer contained several distinct points

The Town of Waukon, v. Strouse.

or grounds upon which it alleged that the petition was assailable. These points were (1) that the court had no jurisdiction of the action, for the reason that such jurisdiction was exclusive in the mayor of the town ; (2) that there was no authority in the mayor of the town to fix the amount of defendant's liability for a refusal to take out a license as a transient merchant ; (3) that the ordinance upon which the action is founded is unconstitutional and void. There were other grounds of demurrer stated; which we need not set out here. The assignments of error are in these words: “(1) The court erred in sustaining defendant's demurrer to the original petition in said cause ; (2) the court erred in sustaining defendant's motion to strike out the first count of plaintiff's amended and substituted petition ; (3) the court erred in sustaining defendant's demurrer to the second count of plaintiff's amended and substituted petition ; (4) the court erred in rendering judgment in favor of defendant and against plaintiff in this action.” The defendant insists that the assignments of error are not sufficiently specific. We think his position must be sustained. It will be observed that there are at least three points in the demurrer. They are not merely repetitions of the same point, but they raise distinct questions. In such case, we are precluded from looking into and determining assignments of error in this general form. Code, sec. 3207 ; *Oschner v. Schunk*, 46 Iowa, 293 ; *Bradley v. Johnson*, 67 Iowa, 614 ; and many other cases. Where the assignments of error are not sufficiently specific, counsel for appellee have the right to stand upon that defect ; and we have no authority to disregard it.

AFFIRMED.

Clapp v. Trowbridge.

CLAPP V. TROWBRIDGE.

POMEROY *et al.* v. THE SAME.

74	550
83	752
74	550
86	756
74	550
115	448

1. **Chattel Mortgage: DEFECTIVE DESCRIPTION: GOOD AS TO CREDITORS WITH ACTUAL NOTICE.** While the record of a chattel mortgage which conveys "eleven Smith farm-wagons," without further designation or description, would not impart constructive notice to subsequent purchasers or creditors, yet, where the mortgagor had only eleven such wagons at the time, and ten of them were in controversy between the mortgagee and an execution creditor, and it appeared that the creditor and the sheriff who levied the executions had actual notice of the mortgage at the time of the levy, and that the mortgagee was claiming the property under it, *held* that the mortgage would hold the property notwithstanding the indefiniteness of the description. (Compare *Cummings v. Tovey*, 39 Iowa, 195.)
2. ——— : ——— : **PAROL EVIDENCE TO AID.** In an action by a mortgagee of "eleven Smith farm-wagons" to recover ten of them from an officer who had levied upon them with actual notice of the mortgage and the mortgagee's claim thereunder, parol evidence was admissible to prove the number of wagons the mortgagor had in possession when the mortgage was given, and that those in controversy were of that number.
3. **Parties to Action: ERROR WITHOUT PREJUDICE.** An appellant is not entitled to have a judgment against him reversed because the trial court allows a stranger to the original action to be made a party thereto, where no prejudice results therefrom.
4. **Replevin: JUDGMENT FOR PROPERTY.** Where there is judgment for defendant in a replevin suit, he is not entitled to judgment for the property or its value, where it appears that it was never delivered to plaintiff.

Appeal from Shelby District Court.—HON. A. B. THORNELL, Judge.

FILED, MAY 26, 1888.

THESE are actions for the recovery of specific personal property. Plaintiffs each claim the property under a chattel mortgage executed by J. F. Loomis. Defendant is sheriff, and he levied on the property

Clapp v. Trowbridge.

under two executions against Loomis. The causes were tried together in the district court, and were submitted in this court on the same record. Plaintiffs allege in their petition that defendant and the execution creditors had notice of the execution of the mortgages before the levy of the execution. The matters of defense relied on are that the mortgages are void for uncertainty of description, and that they were given with intent to hinder and delay creditors. In the case of Pomeroy and Pomeroy & Pierce there was no evidence tending to impeach the good faith of the mortgage, and the court found that it was valid, and the judgment determines that, as against defendant, the mortgagees are entitled to the property. After that judgment, Clapp was permitted, against defendant's objection, to file an amendment to his petition, making Pomeroy and Pomeroy & Pierce parties to his action, for the purpose of having the question of the priority of the mortgages determined. The court found that the mortgage to Clapp was fraudulent, and conferred no rights as against the creditors of Loomis; but he also found that no part of the property was delivered to him under the writ of replevin, and gave defendant judgment against him only for costs. Defendant appeals from both judgments.

J. E. Weaver, for appellant.

Macy & Gammon and *D. O. Stuart*, for appellees.

REED, J.—I. As the district court found that Clapp's mortgage was fraudulent and void as against the creditors, we need not inquire as to its validity in other respects. The description contained in the other mortgage is as follows: "Nine sixteen-inch Pekin plows, six Newton cultivators, one Farmers' Friend corn-planter, one Bradley stalk-cutter, eleven Smith farm-wagons, four Ketchum farm-wagons, two fanning-mills, one stirring-plow." The property involved in the action is ten Smith and Ketchum farm-wagons. That the record of the mortgage would not have

1. CHATTEL
mortgage:
defective
description:
good as to
creditors
with actual
notice.

Clapp v. Trowbridge.

imparted constructive notice to subsequent purchasers or creditors is certainly true. But the court found that both defendant and the execution creditors had actual notice, before the levy, of the existence of the mortgage, and that plaintiffs were claiming the property under it. There was no special finding to that effect, it is true. But the general finding that plaintiffs are entitled to the possession of the property necessarily implies a finding of those facts, and there was evidence tending to prove them. Appellant contends that the evidence did not warrant such finding; but it is sufficient to say, in answer to that position, that the finding is not without support, and, under the well-settled rule, we cannot interfere with it. The case, then, as to this question, depends upon whether, as between the parties to it, the mortgage is void for uncertainty. If A., being the owner of but one wagon, should execute a mortgage or bill of sale of a wagon to B., but not otherwise describing or identifying it in the instrument, there probably would be no doubt but it would be held to apply to the one he had in possession at the time of its execution. It would, as between the parties, be held to be a valid sale or mortgage of that particular article; for it could not be presumed that it was the intention of the parties that the instrument should be without effect. And, as against an adverse claimant who took with actual notice of the transaction, the grantee would have the same rights as against the grantor. If the instrument covered a less number of articles than the grantor had in possession, it may be that a different rule would obtain; but there are respectable authorities holding that in that case the grantee would have the right of selection. *Call v. Gray*, 37 N. H. 428; *Heyward's Case*, 2 Coke, 37. In the present case it was shown that Loomis, when he gave the mortgage, had in possession but eleven Smith and four Ketchum wagons, and that those in controversy are of that number. The case is the same, then, as though he had had but a single wagon, and the mortgage had covered but one. In cases in which we have held instruments of this character void, as against creditors or

Clapp v. Trowbridge.

subsequent purchasers, because of the uncertainty of description, the question was whether the record of the instrument was sufficient to impart constructive notice, and they are not applicable to the question now before us. The instrument involved in *Cummings v. Tovey*, 39 Iowa, 195, contained a description quite as uncertain as the one in question, but the adverse claimant had actual notice of its existence and the rights claimed under it, and the claim of the grantee was sustained.

II. Appellant assigns as error the ruling of the district court admitting parol evidence to prove the number of wagons Loomis had in possession when the mortgage was given, and that those in question were of that number. If the controversy had been between plaintiff and Loomis, there could have been no question as to the admissibility of the evidence. As defendant and the creditors had actual notice of plaintiff's claim when the property was seized, they are in the same position Loomis would have occupied if he had been contesting plaintiffs' right under the mortgage.

III. Complaint is made of the action of the court in permitting Pomeroy and Pomeroy & Pierce to be made parties to the other action. But defendant suffered no prejudice from that action. It neither delayed nor affected the determination of the questions which he was interested in having determined.

IV. Appellant also contended that he was entitled to judgment against Clapp for the value of the property, or its return, on the finding that the mortgage under which he claimed was fraudulent. That would have been true if any part of the property had been delivered to Clapp under the writ of replevin; but, as stated above, the court found that no portion of it had been delivered to him, and that finding is sustained by the evidence. We find no ground for disturbing the judgment.

AFFIRMED.

The Humeston & S. Ry. Co. v. The C., St. P. & K. C. Ry. Co.

74	554
91	23

THE HUMESTON & SHENANDOAH RAILWAY COMPANY V.
THE CHICAGO, ST. PAUL & KANSAS
CITY RAILWAY COMPANY.

1. **Railroads : RIGHT TO CROSS AT GRADE.** The defendant was about to construct its road so as to cross plaintiff's track at grade. Plaintiff's track is level for three hundred feet east and nine hundred feet west of the proposed point of crossing. Just east of this level portion the track descends at the rate of thirty-seven feet per mile for one thousand feet, and just west of it there is an ascending grade varying from six to seventy feet per mile for seven thousand feet. On account of these grades, and the necessity of stopping all trains before crossing another track at grade (see Laws of 1884, chap. 163), the cost, danger and inconvenience of operating plaintiff's road would be much increased by the proposed crossing at grade. In view of these facts, and of the further fact that the cost of an under crossing would be only about fifteen thousand dollars more than the proposed grade crossing, *held* that defendant was not entitled, under section 1265 of the Code, to cross at grade, and that the construction of the proposed crossing was properly enjoined.
2. ——— : **CROSSING AT GRADE : INJUNCTION AFTER MONEY EXPENDED : REIMBURSEMENT.** The question as to how defendant's road should cross that of plaintiff having been submitted to the railroad commissioners, they recommended an under crossing. Such a crossing would require considerable change in plaintiff's established track. Without asking leave to make these changes, and in disregard of the recommendation of the commissioners, defendant expended about six thousand dollars in the construction of a grade crossing, which is sought in this action to be enjoined. *Held* that the expenditure was a voluntary one on the part of defendant, and that plaintiff was under no obligation to reimburse it that amount in order to obtain from a court of equity the injunction which it sought, and which the court found it otherwise entitled to.

Appeal from Ringgold District Court.—HON. JOHN
W. HARVEY, Judge.

FILED, MAY 26, 1888.

PLAINTIFF owns and operates a line of railroad, the *termini* of which are at Humeston, in Wayne county, and Shenandoah, in Page county. Defendant is engaged

The Humeston & S. Ry. Co. v. The C., St. P. & K. C. Ry. Co.

in constructing a railroad between Des Moines and Kansas City, which will cross plaintiff's road in the valley of West Grand river, in Ringgold county. It was proceeding to construct a crossing at grade, when plaintiff brought this action for the purpose of compelling it to adopt either an over or under crossing. This appeal is by defendant, from an order made by the judge in vacation allowing a temporary injunction.

Hubbard & Dawley, for appellant.

W. W. Morsman, for appellee.

REED, J.—Plaintiff's complaint, in substance, is that the operation of its road would be unnecessarily and unreasonably impeded, and the dangers incident to its operation greatly increased, by a grade crossing at the point selected by defendant. The track of plaintiff's road is level for a distance of three hundred feet east and nine hundred feet west of the proposed point of crossing. Commencing at a point one thousand feet east of that point, and extending to within three hundred feet of it, there is an ascending grade of thirty-seven feet per mile, and commencing nine hundred feet west of the point there is an ascending grade for seven thousand feet, varying from six feet to seventy feet per mile.

The provision of the statute prescribing and governing the rights of the parties is found in section 1265 of the Code, which is as follows: "Any such corporation may construct and carry its railroad across, over or under any railway, canal or water-course, when it may be necessary in the construction of the same; and, in such cases, said corporation shall so construct its crossing as not unnecessarily to impede the travel, transportation or navigation upon the railway, canal or stream so crossed. * * *" The inquiry in the case is whether the travel and transportation would be unnecessarily impeded by the construction of a grade crossing at the point selected by defendant for crossing its

1. RAILROADS:
right to cross
at grade.

The Humeston & S. Ry. Co. v. The C., St. P. & K. C. Ry. Co.

track. Under chapter 163, Acts Twentieth General Assembly, a railroad company whose track intersects or is intersected by other railroad tracks on the same level is required to bring all trains to a stop before reaching the crossing. Under that requirement, grade crossings necessarily have the effect to impede to some extent travel and transportation on the lines. But the right to construct and maintain such crossings under proper conditions is clearly recognized both by that chapter and section 1265, and the inconvenience and delay which arise from their use under such circumstances must be borne by the companies whose business is thus interfered with. But by the latter section the duty is imposed upon the company constructing the intersecting line to so construct the crossing as not unnecessarily to interfere with the operation of the other road; and whether a crossing at grade would in any case amount to an unnecessary obstruction of the business must be determined from the circumstances of that particular case. The condition of the track, the grades at and near the point of intersection, the relative cost of an over or under crossing as compared with that of a grade crossing, and the increase of danger in the operation of the road, are proper matters to be considered. It is very apparent, from the foregoing statement, as to the grades in plaintiff's track near the point of intersection, that the operation of its trains will be greatly impeded if a crossing at grade should be maintained. All trains approaching the crossing from the east must, under the requirements of the statute, be brought to a stop not less than two hundred feet from it. They must necessarily be stopped on the ascending grade. The difficulty of starting a heavy train under such circumstances is known to all persons who have had any opportunity to observe the operation of railroads; and in addition to this would be the difficulty of acquiring sufficient momentum before reaching the ascending grade to the west of the crossing to carry the train over it. The trains approaching from the west would necessarily be required to stop on the descending grade. This would

The Humeston & S. Ry. Co. v. The C., St. P. & K. C. Ry. Co.

be attended with many difficulties, and there would be constant danger of collision upon the crossing. The cost of an over crossing in excess of that of one at grade would be fifty thousand dollars or more, and its construction would necessitate a grade in defendant's track of fifty-three feet per mile. If there was no election except between an over crossing and one at grade, we might not be disposed to require defendant to incur this additional cost and the inconvenience which would arise from the construction of its track at that grade. But the evidence shows that a crossing under plaintiff's track can be constructed at a cost of less than fifteen thousand dollars in excess of that of a crossing at grade, and by adopting that course the objectionable grade can be also avoided. In view of these facts, we think plaintiff should not be required to incur the inconvenience and cost and danger which the construction of a crossing at grade would necessarily create. It is true that the business done on its road is very small in comparison with that done on the great lines of the country. Its trains are comparatively light, and the inconvenience of the grade crossing would not be as great as in the case of a more important road; but that is not controlling. The grade crossing, we think, would unnecessarily impede the travel and transportation on its road.

When the controversy first arose, plaintiff filed a complaint before the railroad commissioners, who made an examination, and recommended that the crossing be constructed either under or over the track. The construction of an under crossing involves a very considerable change in plaintiff's track, but it did not at that time make any offer to permit that change. In this action, however, it filed its consent to the making of that change. But in the meantime defendant had done work costing something over six thousand dollars, which will be valueless if the under crossing should be adopted. It was contended by appellant that plaintiff should reimburse it for that expenditure, and that it

2. —: crossing
at grade:
injunction
after money
expended:
reimburse-
ment.

 McCormick v. Lundburg.

could have no standing in a court of equity without having tendered the amount. Appellant, however, made no demand for permission to make the change in plaintiff's track, but proceeded, in total disregard of the recommendation of the commissioners, to construct the crossing at grade. If plaintiff had denied the right to make the change, and defendant had made the expenditure under that denial, the cause would have been very different; but, under the circumstances, the expenditure must be regarded as having been voluntarily made. The order appealed from is right, and it will be

AFFIRMED.

74	558
99	277
74	558
105	144

McCORMICK V. LUNDBURG *et al.*

1. **Appeal : TRIAL DE NOVO : ACTION AT LAW INVOLVED IN EQUITABLE ACTION.** Where an action was begun in equity to cancel a note and mortgage, but a third party intervened, claiming that the plaintiff owed the note and mortgage, and that it (the intervenor), and not the defendant, was entitled to the proceeds, and by stipulation it was agreed that plaintiff should pay a certain amount to the intervenor, and that it should pay the defendant whatever amount the court found due him, and the question thus arising between the defendant and intervenor was tried by the court without a jury, *held* that a trial *de novo* of that question could not be had in this court, though the cause was not transferred from the equity to the law side of the calendar.
2. **Promissory Note : PROVISION FOR ATTORNEY FEES : WHEN NOT COLLECTIBLE.** In an action for the cancellation of a note (which provided for attorney fees) and mortgage, the proceeds of which were claimed by both defendant and intervenor, it was agreed that plaintiff should pay the intervenor the amount due, and that the note and mortgage should be delivered up and cancelled; and this was done accordingly. It was also agreed that defendant should have judgment against intervenor for whatever share of the proceeds he should show himself entitled to. Judgment was afterwards rendered accordingly for a certain sum, but the court refused to allow defendant any attorney fees. *Held* correct, because the action between defendant and intervenor was not based on the note.

McCormick v. Lundburg.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, MAY 28, 1888.

PLAINTIFF executed to defendant Lundburg his promissory note for four hundred dollars, and to secure the same gave a mortgage on real estate. Lundburg indorsed and delivered the note to defendant Morgan. He subsequently gave to the Chicago Lumber Company a written assignment in which he recited that Morgan held it for collection, and that he had no other interest in it. Before the maturity of the note, plaintiff brought an action in equity for the cancellation of it and the mortgage. Morgan answered, alleging ownership of the note, and that he was an innocent purchaser for value; and in a cross-petition, the note in the meantime having matured, prayed judgment for the amount. The Chicago Lumber Company intervened, claiming title to the note under the assignment from Lundburg, and praying for judgment against plaintiff for the amount. It was subsequently stipulated between the parties that the amount of plaintiff's indebtedness on the note was \$332.80, and that he should pay that amount to the intervenor, and it should pay to Morgan the amount of his interest in the note as the same should be determined by the court on the hearing. Plaintiff paid the stipulated sum to intervenor, and the note and mortgage were ordered to be cancelled and surrendered to him. On the hearing the court found that Morgan's interest was one hundred and twenty-five dollars, and entered judgment in his favor for that amount against intervenor. It, however, refused to allow him anything for attorney's fees; the note containing a provision for attorney's fees in case suit should be brought on it. Both parties appeal.

E. S. Wishard, for intervenor.

Seth Morgan, *pro se*.

REED, J.—I. A preliminary question is whether the action is triable *de novo* in this court. Plaintiff's action was in equity, and the issue between intervenor and defendant was tried to the court. Counsel for the intervenor contends that, as no order was made in the court below transferring the issue to the law side for trial, the case should be regarded as an equitable one, and tried according to the rules governing the trial of causes of that character. The uniform practice of this court has been to regard cases which were tried in the lower courts under the rules governing the trial of equitable actions as belonging to that class, whether any question of strictly equitable jurisdiction arose or not. But, in determining whether a case shall here be regarded as at law or in equity, the mere fact that it was tried to the court, rather than to a jury, is not conclusive; for any ordinary action may be tried in that manner. And when the character of the question at issue between these parties, and the manner in which it arose, are considered, we are of the opinion that the case on this appeal should be regarded as one at law. The question is not one of equity jurisdiction, but is determinable in a court of law; and, strictly speaking, it did not arise in the equity action. Neither is it between the parties to that issue. All questions arising under plaintiff's petition were disposed of by the stipulation. This question relates merely to rights of intervenor and defendant in the fund which is the fruit of that litigation. The contention is as to the terms of the agreement under which Lundburg transferred the note to defendant, and we will determine the character of the proceedings here upon a consideration of the nature of the question, and the character of relief demanded, rather than the mere form of the trial below, which, as we have said, would be applicable to an action of either character. As we regard the case as a law action, and as the only question presented is one of fact, it is only necessary to say that, as there was a fair conflict in the

1. APPEAL:
trial de novo:
action at law
involved in
equitable
action.

The State v. Manley.

evidence, we cannot, under the well-settled rule, disturb the finding of the district court.

II. As to defendant's appeal. The agreement of the intervenor was that it would pay defendant whatever sum the court should find in its final decree was due defendant from plaintiff on the note. Defendant's claim was that Lundburg assigned the note to him as collateral security for an indebtedness he was owing him. It is very clear that the object of the parties was to secure that indebtedness to him in case he should be able to establish his claim. The attorney's fee which, under the terms of the note, might be taxed against plaintiff in the action for the enforcement of the note, does not pertain to the debt evidenced by it; but is in the nature, rather, of costs of the proceeding. Intervenor's undertaking was, by its terms, to pay the debt which defendant claimed had been secured by the endorsement of the note. Very clearly it did not include the attorney's fee. The case will be affirmed on both appeals.

AFFIRMED.

74	561
107	658
74	561
118	98
74	561
128	521

THE STATE V. MANLEY.

Larceny : POSSESSION OF GOODS : EVIDENCE TO OVERCOME PRESUMPTION. Where, on a trial for larceny, the state shows that the defendant had the stolen property in his possession soon after the larceny, it is not necessary, in order to overcome the presumption of guilt thus arising, for defendant to establish to the satisfaction of the jury that he did not steal the property; but he is entitled to an acquittal if his evidence is such as to raise a reasonable doubt as to whether he did not come by it honestly. (See opinion for cases followed and distinguished.)

Appeal from Taylor District Court.—HON. JOHN W. HARVEY, Judge.

FILED, MAY 28, 1888.

THE defendant was convicted of the crime of larceny by the verdict of a jury, and was sentenced by the court to a term of imprisonment in the penitentiary, and from that judgment he appeals.

J. L. Brown and Charles Thomas, for appellant.

A. J. Baker, Attorney General, for the State.

REED, J.—On the trial the state proved the larceny of the property described in the indictment, and that defendant soon after the larceny had it in possession. It also proved certain statements made by him before he was arrested as to the manner in which he claimed to have obtained possession of it, which in his examination as a witness he admitted were false. He testified that he obtained the property from a person who had it in possession, and from whom he won it at a game of chance, and that he had no knowledge when he received it that it had been stolen; and he introduced other evidence which tended to corroborate him as to the circumstances under which he received it.

The court gave the following instruction:

“The law is that, when property recently stolen is found in the possession of any person, the burden of proof is upon such person to show how he came into possession thereof; and unless he shows that he came into the possession of said property honestly, then the law will presume he stole the same. And in this case, if you find and believe from the evidence that the cow mentioned in the indictment was the property of the said Scott McFarland, and that she had been stolen from him, and that recently thereafter she was in the possession of the defendant, then you are instructed that the burden would be on the defendant to show that he did not steal the cow, *and this would be sufficient to warrant you in finding the defendant guilty, unless you find that said defendant has established to your satisfaction that he did not steal said cow.*”

The portion of the instruction which we have italicized is erroneous. Under it the jury were warranted

Halley v. Gregg.

in convicting the defendant on proof of the fact that he had the stolen property in his possession, unless he had established to their satisfaction that he did not steal it. But that is not the rule. The defendant was entitled to an acquittal, unless the jury could say, upon a consideration of all of the evidence, that they entertained no reasonable doubt of his guilt. But a reasonable doubt may be engendered by evidence which does not satisfactorily establish the fact sought to be proven. If the evidence was sufficient to raise a reasonable doubt as to whether defendant received the property under the circumstances claimed by him, it necessarily raises such doubt as to his guilt, in so far as that question rests alone upon the fact of his possession. Instructions to the same effect were condemned by this court in *State v. Richart*, 57 Iowa, 245, and *State v. Hopkins*, 65 Iowa, 240, and what is said in *State v. Peterson*, 67 Iowa, 564, is not in conflict with the holding in these cases.

REVERSED.

HALLEY V. GREGG.

1. **Libel and Slander: REPETITION: PLEADING AND PROOF.** It is competent, in actions for slander, to prove a repetition of the slanderous charges for the purpose of showing malice (see cases cited in opinion), but such repetition should not be pleaded, and, when pleaded, may properly be stricken out on motion.
2. **Slander: WHEN ACTIONABLE: CHARGE OF LETTING HOUSE FOR LEWD PURPOSES.** To let a house to fallen women for lewd purposes for one night is a statutory crime (Code, sec. 4015), and to charge one falsely with such crime is actionable *per se*, without pleading special damages.
3. **Libel: CHARGING CRIME: PLEADING SPECIAL DAMAGES.** To constitute libel, it is not necessary that the publication should charge the commission of a statutory crime. (See Code, sec. 4097.) And where the charge made constitutes libel, as defined by said section, it is actionable *per se*, and special damages need not be alleged. (See *Call v. Larabee*, 60 Iowa, 212.)

74	563
94	600
74	563
111	292

74	563
122	541
74	563
124	716

74	563
130	197

74	563
136	199

 Halley v. Gregg.

Appeal from Jackson District Court.—HON. A. J. LEFFINGWELL, Judge.

FILED, MAY 29, 1888.

ACTION in three counts to recover damages for libel and slander. A motion to strike out part of the petition, and a demurrer to the several counts or causes of action, were sustained. Plaintiff appeals.

G. L. Johnson and D. A. Wynkoop, for appellant.

No appearance for appellee.

ROTHROCK, J.—I. The three counts of the petition were complete in themselves. A separate paragraph was added to the petition, in which it was averred, in substance, that the defendant had repeated the slanderous charges upon which the causes of action were founded. A motion was made to strike out this paragraph as redundant and irrelevant. The motion was properly sustained. It is competent, in actions for slander, to prove a repetition of the slanderous charges, for the purpose of showing malice. *Beardsley v. Bridgman*, 17 Iowa, 290; *Schrimer v. Heilman*, 24 Iowa, 506; *Hinkle v. Davenport*, 38 Iowa, 355. But it is wholly unnecessary to plead the repetition of the words. They are merely evidence upon the question of malice.

II. The first count is based upon an alleged libel. It appears from the averments of the petition, in substance, that the plaintiff was a station agent of the Chicago & Northwestern Railway at the village of Nashville, and that the defendant wrote and signed a certain affidavit, and sent it to the superintendent of the railway, in which it was charged that the plaintiff had hired the depot or station-house to two fallen women, for the purpose of carrying on their business therein, for one night, for which he received the sum of

1. LIBEL and
slander: repetition: pleading and proof.

2. SLANDER: when actionable: charge of letting house for lewd purposes.

Halley v. Gregg.

two dollars. The second count of the petition is based upon substantially the same words, alleged to have been spoken to certain persons therein named. In the third count it is charged that the defendant spoke of the plaintiff words, in substance, as follows: that he (plaintiff) carried the keys to the Nashville church and used the church for nothing else than a whorehouse. In all the counts there are proper averments of the malice of the defendant, and the falsity of the words, and that the defendant intended thereby to charge the plaintiff with the crime of letting a house for the purposes of prostitution and lewdness. The demurrer was to the effect that the several counts did not aver that the alleged libelous and slanderous words were false, and that the action could not be sustained because the libels and slanders did not charge the plaintiff with the commission of any crime, and are therefore not actionable without pleading special damages. It will be observed that in all the counts the words alleged to be actionable are claimed to charge the plaintiff with the commission of a crime. By section 4015 of the Code, the letting of any house, knowing that the lessee intends to use it as a place or resort for the purposes of prostitution or lewdness, is a crime. It is not provided that the lease shall be written, or that it shall be for any specified time. It is very plain that if the plaintiff, having charge of a depot building and a church, rented them for the prohibited purposes, he was guilty of a crime; and that is precisely what the slanderous and libelous words charge him with doing. In such cases the words are actionable in and of themselves, and it is not necessary to plead special damages to maintain the action. And in the cause of action for a libel, it is not necessary that the publication should charge the plaintiff with the commission of a statutory crime. It is sufficient if it is such as tends to provoke the plaintiff "to wrath, or to expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence or social intercourse." Code, sec.

8. LIBEL: charging crime: pleading special damages.

Heathcote v. Haskins & Co.

4097. The act with which plaintiff was charged would, if believed by his neighbors, surely expose him to contempt, and deprive him of the benefits of public confidence. In such cases it is not necessary to plead special damages. *Call v. Larabee*, 60 Iowa, 212. The ground of the demurrer, that the libel and slander are not alleged to be false, is not well taken, because it is not correct in point of fact. The petition expressly avers their falsity. We think the demurrer should have been overruled.

REVERSED.

HEATHCOTE V. HASKINS & CO.

1. **Judgment: VACATION: NEWLY-DISCOVERED EVIDENCE.** Plaintiff made default in an action against him, although he knew that the debt on which he was sued had been paid and that receipts had been given therefor. In an action to set aside the judgment rendered on the default, he alleged that he was not able to find the receipts prior to the rendition of the judgment, but that he had since found them; but he did not allege facts showing due diligence in searching for the receipts. *Held* that he was not entitled to a new trial, under section 3154 of the Code, on the ground of newly-discovered evidence.
2. ——— : ——— : **UNAVOIDABLE CASUALTY OR MISFORTUNE.** Where one is aware of the nature of the claim asserted against him in an action at law, and of the disadvantage under which he labors on account of being a foreigner and unacquainted with the English language, and yet neglects to seek information from others who are informed; and where he knows that the debt has been paid and receipts given therefor, and he makes some effort to find the receipts but is unable to find them, and he makes default and judgment is rendered thereon, he cannot, under section 3154 of the Code, have the judgment set aside on the ground of unavoidable casualty or misfortune, especially where he fails to show that he made due effort to find the receipts, or that he could not have proved the fact of payment by other evidence.
3. ——— : **FOUNDED ON FALSE TESTIMONY: VACATION.** Where a defendant in an action knows in advance that the claim asserted against him has been paid, and that judgment can be had only upon false testimony, and knows of the existence of evidence by which the false testimony can be rebutted, but he neglects either to produce that testimony or to assert his defense, but allows judgment by default to go against him, he cannot afterwards have the judgment vacated because it was obtained on false testimony.

74	566
100	382

74	566
109	703

74	566
121	716

74	566
d131	303

74	566
e132	206

Heathcote v. Haskins & Co.

Appeal from Lucas District Court. — HON. DELL
STUART, Judge.

FILED, MAY 29, 1888.

IN 1886 the defendants brought an action against the plaintiff and John and Thomas Heathcote for the enforcement of a mechanic's lien. The defendants in that action were all duly served with the original notice. Thomas Heathcote being a minor, a guardian *ad litem* appointed by the court answered for him, denying the allegations of the petition. Neither John Heathcote nor this plaintiff made any appearance, and judgment was rendered against them by default. Within one year from the rendition of the judgment plaintiff filed his petition in this action, praying that the default be set aside, and for a new trial. Defendants demurred to the petition, but the demurrer was overruled, and upon their election to stand on the demurrer an order was entered as prayed for in the petition. Defendants appeal.

Mitchell & Penick, for appellants.

Dungan & Leech, for appellee.

REED, J.—The question to be determined is whether the case is brought by the allegations of the petition within the provisions of section 3154 of the Code. The averments are that the debt sued for in the original petition was fully paid and discharged before that action was commenced; that when the original notice was served on plaintiff, he commenced to investigate with reference to the claim asserted by defendants, but was unable to find the receipts given by them to him and his co-defendants in the action for the moneys paid by them on the claim, the same not then being in his possession; that since the rendition of the judgment he has procured said receipts, which show that the claim has been fully paid and discharged; that defendant,

Heathcote v. Haskins & Co.

“for the purpose of obtaining said judgment, fraudulently procured the said John Heathcote to appear in his own behalf, and consent to said judgment being rendered in said cause, and for said purpose fraudulently procured the said John Heathcote to swear that said debt still existed, and was unpaid, and that the allegations of their petition were true; and that upon said false and fraudulent testimony the court rendered the judgment against plaintiff.” Also, that plaintiff, being a foreigner, and but slightly acquainted with the language and customs of this country, did not know what was necessary to be done for the protection of his rights in the action. It was contended by counsel for appellee that under these allegations the party is entitled to have the judgment vacated on the grounds (1) of newly-discovered evidence; (2) of unavoidable casualty or misfortune preventing him from defending in the action; and (3) of fraud practiced by the defendants in obtaining the judgment.

I. Is plaintiff entitled to relief on the ground of newly-discovered evidence? To entitle a party to a new

1. JUDGMENT:
vacation:
newly-dis-
covered evi-
dence.

trial, or the vacation of a judgment, on this ground, it must be shown that he exercised all reasonable diligence to discover the evidence before the trial or the rendition of the judgment, and that he was unable to do so. The allegations of the petition do not show that plaintiff exercised that degree of diligence. It is fairly to be inferred from the petition that he knew before the judgment was rendered that the receipts were in existence, for it is averred that he was unable to find them, and that they were not in his possession. It is not shown that he applied to either of his co-defendants in the action for them, or for information with reference to them, nor is there any showing as to what efforts he made to find them. It is very clear that he is not entitled to relief on this ground.

II. It is equally clear that the allegations of the petition do not show that he was prevented by

Heathcote v. Haskins & Co.

2. — : — :
unavoidable
casualty or
misfortune.

unavoidable casualty or misfortune from making his defense. The fair inference from the petition, as we have said, is that he knew the debt had been paid, and that the receipts which defendants had given would show that fact. The allegations are that he was prevented from making his defense by his ignorance as to what was necessary to be done to protect his rights, and by his inability to find the receipts. But he knew the nature of the claim asserted against him, and was also aware of the disadvantage under which he labored in consequence of his ignorance. It was also apparent to him that something was necessary to be done for the protection of his rights. The fact that he was ignorant on the subject imposed upon him the necessity and duty of seeking information from others who were informed with reference to it; and he remained in ignorance because of his neglect to pursue that course, and his failure to make the defense is attributable to that neglect, rather than to his ignorance. His inability to find the receipts did not necessarily prevent him from making his defense, for, as stated above, it does not appear that he might not by the exercise of reasonable diligence have found them in time for the trial. Neither is it shown that he could not have proven the fact of payment by other evidence than the receipts. As to this question the case comes within the rule of *Miller v. Albaugh*, 24 Iowa, 128.

III. That the production upon the trial of false testimony to establish a cause of action or defense would in many cases amount to such a fraud as would entitle the adverse party to a new trial, or the vacation of the judgment, is certainly true. This would be so if the fact of its falsity or the evidence by which the fact could be established was not discovered until after the trial or the rendition of the judgment. But it would be trifling with the law to permit a party, who, being advised in advance that testimony of that character would be resorted to on the trial, and who knew also

3. — : founded
on false testi-
mony : vaca-
tion.

Heathcote v. Haskins & Co.

of the existence of evidence by which the false testimony could be rebutted, but who neglected to either produce that evidence or assert his defense, to afterwards question the judgment because it was founded on that testimony ; for, while it is the policy of the law to afford the parties to litigation the fullest opportunity for the establishment of their rights, it is equally its policy to maintain and enforce the judgments pronounced by the courts after those opportunities have been enjoyed by the parties ; and it appears to us that that is the position in which plaintiff is placed by the averments of his petition. As he knew the nature of the claim asserted against him and the fact that it had been paid, he of necessity knew that it could be established only by false testimony. Yet he neither pleaded the fact of payment nor offered evidence to prove it. If he had not known of the payment, but had discovered that fact since the rendition of the judgment, the case might be different. But that he did know it is fully inferable from the allegations of the petition, and upon that state of facts he is not in position to question the judgment. He has had his day, and has enjoyed the opportunities afforded by the law for making his defense.

REVERSED.

HEATHCOTE V. HASKINS & Co.

Judgment : VACATION : NEWLY-DISCOVERED EVIDENCE. Where a minor was defendant in an action at law, and the court appointed a guardian *ad litem* to answer for him, and an answer was filed denying the allegations of the petition, but neither the minor nor his guardian *ad litem* knew that the debt had been paid, and judgment was rendered against the minor, but afterwards they discovered the fact of payment and the evidence by which it could be proved, *held* that the judgment was properly vacated and a new trial granted, under section 3154 of the Code.

Appeal from Lucas District Court.—HON. DELL
STUART, Judge.

FILED, MAY 29, 1888.

Melhop, Son & Co. v. Tathwell.

Mitchell & Penick, for appellant.

Dungan & Leech, for appellee.

REED, J.—This is a proceeding to vacate the judgment referred to in the (last preceding) case of Robert Heathcote against the same defendant. The case made by the petition, however, is quite different from that. Plaintiff is a minor, and the court appointed a guardian *ad litem* to answer for him in the action in which the judgment was rendered, and an answer was filed, denying the allegations of the petition in that action. It is alleged, however, in the petition that neither plaintiff nor the guardian *ad litem* knew, when the cause was tried, that the claim had been paid, or that the receipts of defendant acknowledging the payment were in existence, but that they had discovered that fact, and the evidence by which it could be proven, since the trial. We are of the opinion that, on the facts alleged in the petition and which are admitted by the demurrer, plaintiff is entitled to have the judgment vacated on the ground of newly-discovered evidence and of fraud on the part of defendants in obtaining it.

AFFIRMED.

MELHOP, SON & CO. V. TATHWELL *et al.*

Contract : COMPOSITION WITH CREDITORS : PAYMENT : TENDER. An insolvent debtor entered into an agreement with his creditors to pay them fifty per cent. of their respective claims, which they agreed to accept in full satisfaction. In a subsequent action to recover the full amount of one of these claims, the defendant offered evidence to show that the fifty per cent. stipulated for in the contract had been placed on deposit in a certain bank, and that their attorney had advised plaintiffs' attorney of that fact, and that the money would be paid upon his depositing in the bank his clients' receipt acknowledging satisfaction in full of the claim. *Held* that this evidence was properly excluded, because it did not tend to show an unconditional offer to pay as provided in the agreement; and that, since defendants had neither performed nor offered to perform their part of the contract, judgment was properly rendered for the full amount of the claim.

Melhop, Son & Co. v. Tathwell.

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

• FILED, MAY 31, 1888.

ACTION on a promissory note and an account for goods sold and delivered. Defendants pleaded a composition contract, whereby plaintiffs and certain other creditors agreed to accept fifty per cent of the amounts severally due them in satisfaction thereof. The cause was tried by the court, and judgment was entered for plaintiffs for the full amount claimed. Defendants appeal.

C. J. Deacon, for appellants.

J. W. Jamison, for appellees.

REED, J.—The agreement pleaded by defendants is as follows: "We, the undersigned creditors of the firm of Tathwell & Brownell, of Springville, Iowa, do hereby agree to accept, in full payment and satisfaction of our accounts and claims against said firm, fifty per cent. of said accounts, the consideration therefor being that all of the creditors of said firm shall accept said fifty per cent. of their said accounts or claims in full payment thereof upon a composition of said firm with their creditors; said fifty per cent. to be paid, one-half thereof in cash when the creditors shall all consent thereto, and the remaining one-half of fifty per cent. to be paid in six months, with eight per cent. interest, secured by note of J. S. Tathwell, indorsed by J. C. Goudy; said firm, however, have the option to pay said entire fifty per cent. in cash." That agreement was signed by plaintiffs and certain other creditors of defendants. At the same time a further agreement was entered into by which defendants agreed to pay a specified amount as attorney's fees to plaintiffs' attorney; the suit having been instituted before the contract was entered into. Defendants alleged a tender of the amount due under the contract. It was proven on the

Melhop, Son & Co. v. Tathwell.

trial that there were certain creditors who did not sign the contract. Defendants, however, offered evidence to prove that they had accepted fifty per cent. of the amounts due them in satisfaction of the whole, but the court excluded the evidence. He also excluded evidence of an offer by defendants to pay to plaintiffs the fifty per cent. stipulated for in the contract.

The judgment that defendants are liable for the full amount of the indebtedness is based upon the following facts, which were specially found by the court, viz.: (1) That defendants had neither paid nor tendered the amount which plaintiffs, by the terms of the contract, agreed to accept in satisfaction of the debt; and (2) that it did not appear that all of defendants' creditors had consented to the composition. If either of these findings was fairly arrived at it will afford sufficient support for the judgment; for, by the terms of the agreement, defendants were to be discharged from liability for the full amount of their indebtedness to plaintiffs only on the payment, at the time and in the manner named in the contract, of the stipulated amount, and in case the other creditors would consent to accept the same proportion of their claims in full satisfaction thereof; and, to entitle defendants to relief under the agreement, it is essential that they show a compliance or a tender of compliance with its requirements. The evidence which they offered for the purpose of establishing an offer of payment of the stipulated proportion of the debt, and which the district court excluded, consisted of certain letters written by their attorney to the attorney for plaintiffs, in which he was advised that the amount of money necessary for the discharge of the indebtedness under the provisions of the contract was on deposit in a certain bank, and would be paid or remitted to him when he sent to or deposited with the bank a receipt in the name of his clients acknowledging full satisfaction of the indebtedness. It is very clear, we think, that the action of the court in excluding that evidence is right. It did not tend to show an unconditional offer by defendants to perform their covenants in

The State v. Hastings.

the contract. By its terms, as we have seen, they were to pay fifty per cent. of the indebtedness. Their offer, however, was not to pay that amount absolutely, but to pay it on condition that plaintiffs would execute and deliver to the bank a written acknowledgment of satisfaction of the whole indebtedness. But plaintiffs, while they agreed to accept that amount in satisfaction of the debt, did not agree to execute or deliver a written release. Neither did they agree to accept the amount from the bank or at its place of business. Under the terms of the agreement they had the right to have the money paid to them in person, or at least to their attorney who had the matter in charge. As defendants' offer, then, was not an offer to perform the conditions as agreed upon by the parties, it is of no avail. The finding of the court on the question is therefore clearly right; and, as that finding alone would fully sustain the judgment, we need not inquire as to the correctness of the ruling excluding the evidence offered to establish that the creditors who did not sign the agreement had yet assented to it and had accepted its provisions.

AFFIRMED.

THE STATE V. HASTINGS.

Bastardy : ORDER AGAINST FATHER FOR SUPPORT : SUBSEQUENT VACATION : EFFECT. In a bastardy proceeding, the defendant pleaded guilty, and an order was made that he pay certain installments for the support of the child "until the further order of the court." Afterwards, in a supplementary proceeding by the father to recover the child with a view of supporting it himself, the custody was left with the mother, but the order to pay for its support was vacated. *Held* that this order was a proper one, in view of the fact that the father had recognized the child as his, and was, without any order to that effect, under obligations to support it. (See Code, secs. 1832, 2466.)

Appeal from Hardin District Court.—HON. H. C. HENDERSON, Judge.

FILED, MAY 31, 1888.

THIS is a proceeding supplementary to a prosecution under the statute relating to the support of bastard

74	574
124	498
74	574
128	175

The State v. Hastings.

children. In the original proceeding the defendant was ordered to pay five dollars a month towards the support of the child. In this supplementary proceeding the order was vacated. The plaintiff appeals.

J. H. Scales and *H. L. Huff*, for appellant.

Geo. W. Ward, for appellee.

ROTHROCK, J.—Although the cause is in the name of the state as plaintiff, it is really a controversy between George Hastings, the father of the child, and Anna L. Lovell, its mother. The original complaint in bastardy was made in 1879, before the birth of the child. It was heard and determined in May, 1880, upon a plea of guilty by defendant. The court ordered that defendant pay into court, for the benefit and support of the child, the sum of fifty dollars, and that he pay the further sum of ten dollars every sixty days, “until the further order of the court.” No default has been made in the payment required by the order. This supplementary proceeding was instituted by the defendant, in which he demanded the custody of the child, to the end that he could take it to his home, and support it in a proper manner, or, in the event that the care and custody of the child should be denied him, the order requiring him to pay ten dollars to the mother every sixty days be vacated. There was a full trial to the court, and the mother was awarded the continued custody of the child, and the defendant was released from the payment of any further sum for its support. From this order the plaintiff appeals. Some question is made about the record in the case pertaining to the bill of exceptions, and the certification of the evidence. We think the record is complete, and the appeal properly presented, and will proceed to determine the case upon its merits.

The district court was of opinion that the child should remain with its mother. The defendant did not appeal from the order, and it is not necessary to consider the question as to whether it is better for the welfare of the child that it should remain with the mother.

The State v. Hastings.

The sole question is whether, under the facts of the case, the father should be required to pay to the mother a fixed sum for the support of the child. There can be no question that the court had jurisdiction to vacate the original order. The power to vacate is expressly given by section 4722 of the Code, and the order itself reserves to the court the power to vacate it. It provided that the payments shall be made "until the further order of the court." The question for our determination is, was the vacation of the order erroneous? The defendant is possessed of considerable property. He is an unmarried man, and maintains a house, with his mother as housekeeper. The mother of the child is a divorced woman, with two or three children, the issue of her marriage. She is poor, and supports her children by her labor. Considering these facts alone, it would seem that it would be better for the welfare of the child that its custody should be awarded to the father; and it would also be thought, from the situation of the parties, that the father ought to support the child. But the court, in vacating the order, was, no doubt, influenced by other considerations. The defendant is not thereby released from the support of the child. By his plea of guilty in the original proceeding, and by express written averment in this proceeding, he claims to be the father of the child. By this recognition the child stands in the same relation to him as though born to him in lawful wedlock (Code, sec. 2466); and he is chargeable with its support. Code, sec. 1332. The court may have been of the opinion that it would be better for the child to leave the defendant with this general obligation upon him; and we are not prepared to say that the court erred. The defendant's counsel resists this appeal, upon the ground that he is not discharged from his obligation to support the child; and we think, when he refuses to do so, it will be time enough to use compulsory measures to compel him to support his offspring.

AFFIRMED.

Michel v. Michel.

MICHEL V. MICHEL.

74 577
90 230

Appeal : NO SHOWING OF SERVICE OF NOTICE. Where the abstract contains a notice of appeal, but contains no evidence or averment that such notice was served on the appellee or his attorney, or on the clerk of the trial court, this court has no jurisdiction except to dismiss the cause.

Appeal from Linn District Court.

FILED, MAY 31, 1888.

Thompson & Lanning, for appellant.

No appearance for appellee.

REED, J.—Plaintiff brought an action for divorce in the district court of Linn county, on the ground of abandonment. He has filed in this court an abstract, which contains the petition and evidence introduced on the trial, and the order of the court dismissing the petition. The record also shows that the original notice was served by publication in a newspaper published in the county. What purports to be a notice of appeal is also set out in the abstract; but there is no evidence in the record that this notice was ever served, either on the defendant or the clerk; nor is there any averment in the abstract that it was served. An appeal to this court can be taken only by serving a written notice upon the adverse party, or his attorney, and the clerk. Code, secs. 3178, 3179. The service of such notice is essential to give this court jurisdiction of the cause, and the facts essential to jurisdiction must be shown by the record. As it does not appear that an appeal has been perfected in the case, the only action we can take in it is to strike it from the docket.

DISMISSED.

THE STATE V. DAVIS.

Criminal Evidence: CONTRADICTIONARY STATEMENTS OF WITNESS OUT OF COURT: INSTRUCTION. Defendant was charged with an assault with intent to commit murder. His wife gave evidence on the trial tending to prove that he acted in self-defense. In rebuttal the state introduced evidence of statements made by her before the trial, which were inconsistent with her testimony, and which, if true, showed defendant to have been the aggressor. *Held* that such rebutting evidence was admissible only as affecting the credibility of the witness, and that an instruction (see opinion), from which the jury might infer that it was to be considered in determining the question of self-defense, was erroneous.

Appeal from Lucas District Court.—HON. DELL STUART, Judge.

FILED, JUNE 1, 1888.

THE defendant was accused by indictment of the crime of assault with intent to commit murder. The jury found him guilty of assault with intent to commit manslaughter, and the court pronounced judgment against him on the verdict, and he appeals.

Mitchell & Penick, for appellant.

A. J. Baker, Attorney General, for the State.

REED, J.—Defendant's wife, who was present at the occurrence in question, gave evidence on the trial, and her evidence tended to prove that defendant, in the transaction, acted in self-defense. In rebuttal, the state introduced evidence which tended to prove certain statements or admissions made by her before the trial, which it was claimed were inconsistent with her testimony. The court gave the following instruction: "There has been some evidence of statements by witnesses in conversations shortly after the trouble in controversy.

The State v. Davis.

Admissions and statements made by parties in conversations should be received and considered carefully. All due allowance should be made for a possible misunderstanding of what the party said, or of the failure of memory to correctly retain just what was said. Admissions and statements in loose and random conversations are considered to be of an inferior grade of evidence. But when the evidence is clear and satisfactory, and the admission or statement was clearly understood and correctly retained by the memory of the witness, and clearly stated by him, then the evidence is entitled to the same weight and consideration as other satisfactory evidence." This instruction was calculated to mislead the jury. They would understand that it laid down a rule for their government in considering the evidence with reference to the statements and admissions of defendant's wife; for that was the only evidence in the case to which it could have had reference. They would also understand that, if the alleged statements were proven, they were to consider them in the determination of the case; and, abstractly, that is correct. But the vice of the instruction is that it gave the jury no direction as to the subject to which the evidence was applicable. If the witness made the statements attributed to her, and they are true, the defendant was the aggressor; and, under the instruction, the jury doubtless understood that they were to consider them, if they found them proven, in determining that question. But, as it is, they were mere hearsay. The state was entitled to introduce the evidence as affecting the credibility of the witness, but for no other purpose, and the jury should have been so instructed. It is true, the court, in another instruction, told the jury that a witness might be impeached by proof of statements made by him at other times contradictory of his testimony. But they were not told that the evidence of contradictory statements could be considered only in that connection. The vice of the instruction was therefore not cured.

REVERSED.

The State v. Smith.

THE STATE V. SMITH.

1. **Appeal : FROM ORDER SETTING ASIDE INDICTMENT : EVIDENCE IN ABSTRACT.** Where a motion to set aside an indictment is based on a certain alleged fact, and is sustained, and the state appeals, and admits in its abstract that the allegation on which the motion was based is true, this court can review the ruling, and it is not necessary that the abstract should contain all the evidence submitted to the court below in support of the motion.
2. **Criminal Law : RIGHT TO BE CONFRONTED WITH WITNESSES : PROCEEDINGS BEFORE GRAND JURY : DOCUMENTARY EVIDENCE.** The constitutional right of one accused of a crime to be confronted with the witnesses against him does not relate to investigations by the grand jury, nor does it have any reference to documentary evidence in any case. (See *State v. Matlock*, 70 Iowa, 229).
3. **— : LIQUOR NUISANCE : PHARMACIST'S REPORT OF SALES AS EVIDENCE AGAINST HIM.** Where a pharmacist holding a permit to sell intoxicating liquors is indicted for keeping a nuisance under the prohibitory liquor law, the indictment will not be set aside because the grand jury received and considered as evidence against him his monthly reports which the law required him to file with the auditor, on the ground that to use such reports against him is compelling him to testify against himself.
4. **Indictment : SETTING ASIDE : INSUFFICIENT EVIDENCE.** An indictment cannot be assailed upon motion on the ground that it is not sustained by sufficient evidence.

Appeal from Jasper District Court.—HON. D. RYAN,
Judge.

FILED, JUNE 4, 1888.

THE defendant was indicted for the crime of maintaining a nuisance by keeping a place for the unlawful sale of intoxicating liquors. The indictment is in the usual and lawful form. Upon a motion made by defendant, the district court set aside the indictment. From this decision the state appeals.

A. J. Baker, Attorney General, and A. M. Harrah,
County Attorney, for appellant.

Winslow & Varnum, for appellee.

74	580
97	63

74	580
111	73

74	580
122	662

74	580
129	707

BECK, J.—I. The motion to set aside the indictment sustained by the district court contained the following statement of the grounds upon which it was based: “The grand jury returning the indictment herein received and acted upon evidence which was illegal, in violation of the bill of rights, and contrary to the fifth amendment to the constitution of the United States; that is to say, the law authorizing registered pharmacists to sell intoxicating liquors, having a permit therefor, also requires that they shall make monthly reports to the auditor of the county of all sales made by them. Such reports are made in obedience to law, and can never be made the basis upon which to found a criminal charge; nor can such reports be offered in evidence against the person making them, upon the trial of a criminal charge against him. And the grand jury in this case, as shown by the evidence returned with the indictment, received such reports and acted upon the same, and such action was and is illegal, and the indictment based thereon is illegally found and void.” The motion was sustained upon these grounds.

II. Counsel for the defendant insist that the decision of the district court must be sustained, for the reason that the abstract fails to show all the evidence submitted to the court in support of the motion, and that there was such evidence other than that found in the transcript of the record upon which the case is submitted. This is not denied by the attorney general. We do not think it necessary that all the evidence given to the court below in support of the motion should be before us, to the end that the decision complained of may be reviewed. The evidence upon which the court acted, we will presume, was pertinent to the issue presented by the motion, and was of no other character. It could not therefore have been broader than the allegations of the motion, and contained matter not contemplated therein. Whatever evidence was submitted upon the motion, in the absence of a showing in the record to the contrary,

1. APPEAL: from order setting aside indictment: evidence in abstract.

The State v. Smith.

we will presume establishes the fact upon which the district court based its rulings. These facts, we will further presume, were those, and none other, alleged in the motion as grounds thereof, for the district court could not correctly have based the ruling upon any other facts. We will not presume that such a thing was done, but, on the contrary, will presume that it was not done. It is, therefore, unnecessary that there should be before us for consideration other or further evidence than is found in the abstract upon which the case is submitted to us for decision. The abstract shows that the grand jury received and considered as evidence the monthly reports referred to in the motion, and the district court held, and so ruled, that such evidence was unauthorized by law, and by reason thereof the indictment was illegally found, and thereupon it was set aside.

III. We are now required to determine whether the decision of the district court setting aside the indictment is correct. This is the only question remaining for our determination. The defendant, being a registered pharmacist holding a permit authorizing him to sell intoxicating liquors, was required by the statute to make the monthly reports referred to in the motion. These reports became records of the auditor's office. See chapter 83, sec. 2, Acts 21st Gen. Assem.; *State v. Thompson, ante*, p. 119. The permit held by defendant did not protect him from prosecution and conviction for sales of intoxicating liquors for purposes other than those authorized by law. *State v. Ward*, 36 N. W. Rep. 765.

IV. Counsel for defendant first insists that article one, section ten, of the constitution of the state, which declares that in all prosecutions for crimes the accused "shall be confronted with the witnesses against him," was violated by the admission of the evidence in question before the grand jury. But, in the first place, the evidence was not admitted in the prosecution of the crime of which defendant was charged, but before the grand jury making the charge. The provision, if bearing the construction claimed by counsel,

2. CRIMINAL
law: right to
be confronted
with wit-
nesses: pro-
ceedings
before grand
jury: docu-
mentary evi-
dence.

The State v. Smith.

would defeat all indictments, unless the accused and the witnesses against him were "confronted" before the grand jury. Such a thing is never done, and has never been claimed as the right of the accused, and is unauthorized by law. But the objection, if made at the trial of an indictment, would not be good, for the evidence objected to is a matter of record, to which, this court has decided, the constitutional restriction in question is not applicable. *State v. Matlock*, 70 Iowa, 229.

V. Counsel for defendant maintain that, by the admission of the evidence in question before the grand jury, defendant was made to testify against himself, which is in conflict with the constitution of the United States, the statutes of this state, and the common law as recognized by all the courts of the country. It is probably settled by the decisions of the United States supreme court that the provision of the federal constitution (fifth amendment) relied upon by counsel is applicable alone to prosecutions arising under the laws of the United States. We need not pursue inquiry in that direction, but regard as correct counsel's position that defendant cannot be required to give evidence against himself, and is protected in that regard by all statute, constitutional and common-law guaranties to the fullest extent, as claimed by counsel. We are brought to inquire whether defendant was required or did become a witness against himself by the admission in evidence before the grand jury of the reports which he made in obedience to the requirements of the law. The case is this and nothing more: The defendant, in the discharge of a requirement of the law, deposited with the county auditor certain reports verified by him, which became a part of the records of the auditor's office. These were admitted in evidence before the grand jury. With their effect as evidence we have nothing to do; no question in that direction is raised. These papers are not to be regarded as the testimony of defendant. They were written, verified and deposited with the auditor by defendant. Thereupon they became public records of

8. —: liquor
nuisance:
pharmacist's
report of
sales as evi-
dence against
him.

The State v. Smith.

the office, which are open to the inspection of all, and may be used in evidence in all cases between all parties, when competent, to establish any fact in issue for judicial determination. Because defendant may be affected by the facts they disclose—may be shown to be a violator of the law thereby—he cannot object to their competency, or claim that his rights are violated by their use in establishing the truth which may tend to convict him of crime. An officer, or another charged with the duty of making and verifying a document which becomes a public paper or a public record, cannot claim that, while it is evidence against or for all other men, he must be shielded from the effect of the truth it discloses, for the reason that he wrote or verified it, and these acts of his own tend to show he was a violator of the law. If the rule contended for by counsel be recognized, embezzlers, those who alter or falsely keep public or private accounts, those who prepare and publish as correct false and fraudulent documents, and others equally guilty, in numerous cases which can be mentioned, will all escape the condemnation which their own acts demand. So would the rule forbid the introduction in evidence of admissions and confessions, for the reports in question are to be regarded as of that character.

VI. But for another reason the motion was erroneously sustained. An indictment cannot be assailed by a motion on the ground that it was found
4. INDICTMENT: upon incompetent or insufficient testimony.
setting aside: Code, secs. 4337, 4344; *State v. Tucker*,
insufficient 20 Iowa, 508; *State v. Morris*, 36 Iowa, 272; *State*
evidence. v. *Fowler*, 52 Iowa, 103. The Code, in the sections above cited, prescribes the grounds upon which an indictment may be set aside on the motion of the defendant. The insufficiency or incompetency of the evidence upon which it is found, or the fact that the rights of the accused were violated in the proceeding before the grand jury, are not causes for setting aside the indictment under the statute. This point was not made on the submission of the case for our decision. We present it here for the reason that we do not wish,

The Des M. Street Ry. Co. v. The Des M. Broad Gauge R. R. Co.

by silence, to give seeming sanction to the authority of the district court to review on motion the evidence upon which a grand jury acted.

In our opinion, the district court erred in sustaining the motion to set aside the indictment.

REVERSED.

THE DES MOINES STREET-RAILWAY COMPANY V. THE
DES MOINES BROAD-GAUGE STREET-RAILROAD
COMPANY *et al.*

74	585
90	771
74	585
121	592

Cities and Towns: REGULATION OF STREET RAILWAYS: VESTED RIGHTS: VIOLATION OF INJUNCTION: PUNISHMENT: COSTS. By a former decree of this court, the city of Des Moines, the mayor and marshal thereof, and their successors in office, were enjoined from "interfering in any way with the construction, extension or operation, by animal power, of the plaintiff's line of street railway upon any of the streets of the city of Des Moines; provided, this decree shall not be held to operate as a restraint upon the city of Des Moines of a proper police and equitable control over the streets of said city, and the power to make reasonable regulations as to the manner of construction of said lines, the places in the streets where the same shall be located, and the character and extent of service that shall be furnished thereon." The ordinance under which plaintiff's railway was built and operated did not designate the width of track to be adopted, but plaintiff adopted a narrow-gauge track and had operated it for fifteen years. Shortly after said injunction was issued, the city passed resolutions requiring the tracks of all street railways to be of the standard or broad gauge. Under these resolutions, the mayor and marshal of the city arrested, or caused to be arrested, employes of the plaintiff while engaged in laying down an extension of its narrow-gauge track on one of the city streets.

Held—

- (1) That the city did not have the power to require the plaintiff to use the broad gauge in extending its track.
- (2) That the mayor and marshal were guilty of a violation of the injunction; but
- (3) That, since they did the acts complained of only because they believed it to be their duty to do them under the resolutions and ordinances of the city, they should not be punished, except nominally, provided they will file with the clerk a written assurance that they will not again violate the injunction; but that they must pay the costs.

The Des M. Street Ry. Co. v. The Des M. Broad Gauge R. R. Co.

Original proceeding in this court for contempt in violating an injunction.

FILED, JUNE 4, 1888.

Parsons & Perry and Kauffman & Guernsey, for plaintiff.

Cummins & Wright and J. H. Detrick, for defendants.

PER CURIAM.—At a prior term of this court, in certain causes therein pending, in which the plaintiff, the defendant railway company and the city of Des Moines were parties, a decree was entered enjoining and restraining the city of Des Moines, the mayor and marshal thereof, and their successors in office, from “interfering in any way with the construction, extension or operation, by animal power, of the plaintiff’s line of street railway upon any of the streets of the city of Des Moines: provided, this decree shall not be held to operate as a restraint upon the city of Des Moines of a proper police and equitable control over the streets of said city, and the power to make reasonable regulations as to the manner of construction of said lines, the places in the streets where the same shall be located, and the character and extent of service that shall be furnished thereon.” Subsequent to entering such decree, and on the twenty-fifth day of May, 1888, when the plaintiff was engaged in laying down its railway track along and upon Grand avenue, a street in said city, the defendant, William L. Carpenter, mayor, and Alfred Jarvis, marshal thereof, interrupted and arrested, or caused to be arrested, men in the employ of plaintiff, and engaged, under its direction, in laying down said track; and the plaintiff claims that in so doing the said Carpenter and Jarvis are in contempt of the authority and decree of this court, and the object of this proceeding is to punish them therefor. In response to a rule to show cause why they were not in contempt,

The Des M. Street Ry. Co. v. The Des M. Broad Gauge R. R. Co.

the said Carpenter and Jarvis, admitted that they had caused the arrest of the employes of the plaintiff, and had interrupted and prevented it from laying down its track upon said avenue, and justified the same under and by virtue of certain resolutions of the city of Des Moines. It appears from the record that the gauge of the plaintiff's road is three and one-half feet, and that such gauge was adopted, as the plaintiffs claim, under and by virtue of an ordinance of the city, passed in 1866, granting the plaintiff the exclusive right to lay its tracks in the streets of the city, and operate the same with animal power. The ordinance failed to prescribe the gauge of the road, but it is a conceded fact that the plaintiff adopted the gauge, laid its tracks, maintained and operated the same, for the last fifteen years, without objection upon the part of the city, until the passage of the resolutions relied upon by said defendants in justification of their acts. There is nothing in the record showing that any other gauge of road was ever used or operated by the plaintiff under said ordinance. On the twenty-third day of May, 1888, the city council passed a resolution declaring that the tracks of all street railroads occupying or desiring to occupy the streets of the city shall be so laid that the same shall be of the standard or broad gauge,—four feet eight and one-half inches wide. The declared object of this resolution was to “protect the rights of the traveling public against a great nuisance and obstruction of travel.” On the succeeding day the city council adopted a preamble and certain resolutions, which are quite lengthy. The substance of the preamble, or recital of facts upon which the resolutions are based, is that the plaintiff had in many specified particulars violated the ordinance of 1866, and therefore the council, by the adoption of the resolutions last referred to, declared all rights of the plaintiff under said ordinance forfeited, and directed an action to be commenced to enforce the forfeiture, and the plaintiff was forbidden and prohibited from operating its road, or laying down any tracks in the

The Des M. Street Ry. Co. v. The Des M. Broad Gauge R. R. Co.

streets of the city. After the issuance of the rule to show cause, the city council adopted another preamble and resolutions not materially different from those last above referred to, except that the object and purpose of the council is declared to be that the forfeiture declared should not take effect until the passage of an ordinance, which is set out in the record, granting the plaintiff the right to operate its road by animal power upon certain terms and conditions materially different from the ordinance of 1866. The foregoing is a sufficient statement of the material facts, and counsel have elaborately argued the questions involved. We are pressed for, and the necessities of the case seem to require, an early decision. We therefore deem it best to briefly state our conclusions, without, for the want of time, stating our reasons therefor, or the citation of authorities in support of our conclusions.

I. Under the pleadings and issues in the actions on which the decree of this court is based, we have a clear conviction that the city, and officers thereof, were, by such decree, enjoined from interfering with or in any manner preventing the plaintiff from laying its track on Grand avenue so as to connect its system of road on the east and west sides of the Des Moines river.

II. That the resolutions passed by the city council since the rendition of the decree, and the proposed passage of the additional ordinance, affords no excuse or justification of the acts of the mayor and marshal.

III. We have not considered the right of the city to forfeit the contract, or whether the matters relied on justify the same, or whether the city has authority to forbid the laying down of any street railway in any street, or part of a street, in the city.

IV. We are of the opinion that the city does not now have the power to require the plaintiff to lay down such additional track as it may desire to, on a different gauge from that heretofore in use.

V. We are satisfied that William L. Carpenter, mayor, and Alfred Jarvis, marshal, of the city of Des

The State v. Kelly.

Moines, disobeyed the decree of this court, for the reason only that they believed it their duty to do so under the resolutions and ordinances of the city. Therefore they should not be punished, except nominally, provided they will not further interrupt the plaintiff in laying down its track on Grand avenue; and their assurance in writing, filed with the clerk, that they will not do so, will be regarded as sufficient. They, however, must pay costs.

74	589
108	542
74	589
130	398

THE STATE V. KELLY.

1. **Criminal Law : LIABILITY OF WIFE FOR ACTS DONE IN HUSBAND'S PRESENCE : PRESUMPTION OF COERCION : EVIDENCE TO REBUT.** The law presumes that the influence of a husband over his wife is such that she is not held criminally liable for unlawful acts done by her in his presence, unless there is evidence to rebut this presumption, and satisfy the jury that she was exercising a free volition and was guilty of an independent criminal act; and the mere fact that she attempts to conceal her husband's crime does not make her a party to it, but evidence of such efforts on her part may be considered as bearing upon her guilt or innocence of the crime. (Compare *State v. Fitzgerald*, 49 Iowa, 260.)
2. **—— : MURDER BY HUSBAND : COMPLICITY OF WIFE : EVIDENCE.** The evidence in this case considered (see opinion), and *held* that it was not sufficient to sustain a verdict of manslaughter,—it not appearing therefrom that, when the murder was committed by defendant's husband, she, if present, took any part therein either by word or act; or, if she did, it did not rebut the presumption that she was coerced by her husband.

Appeal from Lucas District Court.—HON. CHARLES D. LEGGETT, Judge.

FILED, JUNE 4, 1888.

INDICTMENT for murder. Trial by jury, and verdict and judgment for manslaughter. Defendant appeals.

Mitchell & Penick, for appellant.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—The defendant was jointly indicted with her husband, Thomas Kelly, for the murder of one Charles Archibald. Thomas Kelly was first tried. He was convicted, and is now confined in the penitentiary. The evidence shows conclusively that the deceased was brutally murdered by Thomas Kelly, and the question presented to the jury upon the trial of the defendant was whether she participated with her husband in the commission of the crime.

The court gave the jury the following among other instructions:

“The law presumes that the influence of a husband over his wife is such that she is not held criminally liable for unlawful acts done by her in his presence, unless there is evidence to rebut this presumption, and satisfy the jury that the wife in what she did was exercising a free volition, and was guilty of independent criminal action on her own part; and if you find from the evidence that the defendant Margaret Kelly was concerned in the commission of or did the criminal act charged in the indictment to have caused the death of Charles Archibald, or aided or abetted its commission, but that what she so did was done in the presence of her husband, the law presumes, if there is no evidence to the contrary, that she was coerced by her husband to do all such criminal acts as were done by her in his presence; and she cannot be found guilty of such acts by your verdict, unless you find from the evidence that she was exercising, in what she did, a free will to do or not to do, and an independent criminal action on her own part. But if you find from the evidence that she was so exercising a free will, and an independent criminal action, the mere presence of her husband at the time she did any criminal act will not protect her from its consequences. The law does not require a wife to become an informer against her husband, or to expose his crimes or infamies; and if you do not find from the evidence, when considered under the instructions of the

1. CRIMINAL
law: liability
of wife for
acts done in
husband's
presence:
presumption
of coercion:
evidence to
rebut.

The State v. Kelly.

court, that she was concerned in the commission of the criminal acts charged in the indictment, but you do find that after they were committed the defendant did acts tending to conceal the crime of her husband, or to divert suspicion from him, such acts would not render her guilty of his criminal acts. But you may consider evidence of acts done by the defendant after the killing of Charley Archibald, and tending towards such killing, or intending to divert suspicion from defendant or her husband, in connection with the other evidence in the case, as bearing upon her guilt or innocence of the acts charged in the indictment."

It appears from the evidence that the deceased was a feeble old man, who lived in a house alone; that he had a considerable sum of money; and that he frequently visited the house of defendant and her husband, who lived near to him. He was at their house on the evening of April 7, 1886. On the next morning his dead body was found near his own house. He had been murdered, and his body dragged from the house of the defendant to where it was found. Blood-stains were found in the house of the defendant, and upon the clothes worn by Thomas Kelly. There were other unmistakable evidences that the murder was committed in Kelly's house. A tin can with some twelve hundred dollars in it was found concealed in a coal-house attached to Kelly's house. There is no direct evidence that the defendant participated in the crime. There were no blood-stains found upon her clothing, and, indeed, there is no evidence in the case in any way connecting her directly with the acts of violence which produced the death of Archibald. She admits in her testimony that she was present in her house with her husband and Archibald, and that the first she knew of any intention to do harm to Archibald, her husband struck him, and knocked him from the chair on which he was sitting, and that she then ran from the house, and remained away for a time, and that upon her return Archibald was not there. The fact was that the body had been placed in the cellar

2. — : murder
by husband :
complicity of
wife : evi-
dence.

The State v. Kelly.

of the house ; and it appears pretty clearly that it was removed therefrom in the night, and dragged to the place where it was found on the next morning. No witness testified to any fact connecting her with any act done in connection with the crime until the next morning. It appears from the testimony of some of the witnesses that she then did certain acts with the evident purpose of concealing the crime. These acts consisted of sweeping a walk over which the body had been dragged so as to wipe out the trail or marks made upon the walk by the body, and by covering up certain spots or marks upon the track, by moving her feet backward and forward. Indeed, there is little doubt from the evidence that the defendant did acts tending to conceal the crime, and divert suspicion from her husband.

We think the law with reference to the criminal responsibility of a married woman was correctly given by the court to the jury in the instruction above set out. See *State v. Fitzgerald*, 49 Iowa, 260 ; 1 Whart. Crim. Law, sec. 71 *et seq.* ; 1 Bish. Crim. Law, sec. 358, *et seq.* But we think if the jury had followed the instruction there was no evidence to warrant a verdict against the defendant. We have read the evidence with care, and, giving it the fairest and fullest consideration, we fail to find any ground for holding that if the defendant was present when the crime was committed she took any part therein, either by word or act ; and, if she did, there is no evidence rebutting the presumption that she acted under the coercion of her husband.

Complaint is made of the refusal of the court to give certain instructions asked in behalf of the defendant. We think they were rightly refused. The instructions of the court upon the questions involved were as favorable to the defendant as could fairly be asked.

The judgment will be reversed, and the cause remanded for a new trial, upon the ground that the verdict is without support in the evidence.

REVERSED.

Wooster v. The Chicago, M. & St. P. Ry. Co.

**WOOSTER V. THE CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY.**

74	593
113	362
74	593
116	88

1. **Bill of Exceptions: SKELETON: IDENTIFYING EVIDENCE.** The "skeleton" bill of exceptions in this case referred to the evidence to be inserted therein as follows: "Here insert plaintiff's evidence." "Here insert evidence of defendant." *Held* that a motion to strike the evidence inserted under such directions from the files must be sustained, because the evidence to be inserted was not identified, nor any source indicated from which it should be obtained. (See opinion for cases followed.)
2. **Railroads: INJURY TO CATTLE ON TRACK: RECOVERY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.** A person who drives his cattle over a railroad crossing without looking or listening for a train is guilty of negligence; but where the cattle are killed by a train, and it is shown that the company's employes, by the use of ordinary care and prudence, could have avoided the injury after discovering the danger, a recovery cannot be defeated on account of the owner's contributory negligence. (See *Morris v. Chicago, B. & Q. Ry. Co.*, 45 Iowa, 29.)

74	593
113	189

Appeal from Jones District Court. — HON. J. H. PRESTON, Judge.

FILED, JUNE 5, 1888.

THIS is an action at law for the recovery of damages for killing and injuring certain cattle, the property of plaintiff, by the alleged negligence of defendant's employes in running and operating a train of cars upon defendant's railroad. There was a verdict and judgment for plaintiff. Defendant appeals.

A. L. Bartholomew and Thompson & Lanning, for appellant.

Herrick & Doxsee and E. Keeler, for appellee.

VOL. 74—38

ROTHROCK, J.—I. The first question to be determined is a motion filed by appellee to strike the evidence from the files of this court, because it was not properly made of record by a bill of exceptions. The bill of exceptions by which it was sought to preserve the evidence was what is denominated a “skeleton bill.” It referred to the evidence to be inserted therein as follows: “Here insert plaintiff’s evidence;” “Here insert evidence of defendant.” There was no other reference to the evidence. The motion must be sustained. The bill of exceptions does not identify the evidence, nor indicate any source from which it is to be obtained. It is a mere general direction to the clerk to insert the evidence, and leaves the question as to what it was entirely to the discretion of the clerk. We have frequently determined that this is insufficient. *Hill v. Holloway*, 52 Iowa, 678; *Wells v. Burlington, C. R. & N. Ry. Co.*, 56 Iowa, 520; *Tootle v. Phoenix Ins. Co.*, 62 Iowa, 362.

II. It appears from the pleadings, and from the instructions given by the court to the jury, that the plaintiff’s cattle were in charge of his son, who attempted to drive them over the defendant’s railroad track, and that some of them were struck and killed by a passing engine. The defendant requested the court to instruct the jury that, if they found from the evidence that the person who had the cattle in charge knew that the defendant’s track was to be passed over by the cattle, and that he did not look or listen for an approaching train, but suffered the cattle to go upon the track without taking these precautions, this would in law be contributory negligence, and the plaintiff could not recover.

The court refused to give this instruction, and on its own motion instructed the jury as follows:

“In determining whether plaintiff or his son in charge of said cattle were negligent and contributed to

1. BILL of exceptions: skeleton: identifying evidence.

2. RAILROADS: injury to cattle on track: recovery notwithstanding contributory negligence.

Wooster v. The Chicago, M. & St. P. Ry. Co.

the injury, you may consider whether said son was a suitable person to have charge of the cattle; whether, as an ordinarily prudent person, he should have anticipated the passing of the train at the time; whether he looked and listened for any train, or would have seen one if he had looked, or heard it if he had listened; whether any train was in sight at the time the cattle commenced crossing the track; whether, in the management of said cattle, he acted as an ordinarily prudent person,—and all other facts and circumstances in evidence before you; and if you find therefrom that plaintiff's son did not use ordinary care in his conduct at the time, then he was negligent, and if such negligence contributed to produce the injury complained of, plaintiff cannot recover."

The court, at the request of the defendant, submitted a special interrogatory to the jury, which, with the answer thereto, was as follows: "Did the person in charge of plaintiff's cattle, at any time before driving the same over defendant's track, look or listen for the train, or take any precaution to ascertain whether or not any train was approaching the crossing?"

A. "No." It is urged by counsel for appellant that the answer to the special interrogatory is inconsistent with the general verdict, and a motion was made in the district court for judgment for the defendant on the special verdict. It is true, as claimed by the defendant, that the answer to the special verdict was a complete and explicit finding that the person in charge of the cattle was guilty of contributory negligence. Where a person recklessly approaches and attempts to cross a railroad track without looking or listening for an approaching train, and "without taking any precaution to ascertain whether or not any train is approaching," he is chargeable with contributory negligence. But notwithstanding this legal proposition is well established, it does not necessarily follow that the plaintiff is not entitled to recover. The petition is grounded upon the alleged fact that the servants and employes

Wooster v. The Chicago, M. & St. P. Ry. Co.

of the defendant in charge of the train knew, or ought to have known, that the cattle were upon and crossing over the track, and that, having such knowledge or means of knowledge, they negligently failed to make any effort to slacken the speed or stop the train, and that by reason of said negligence the cattle in question were killed. And the court instructed the jury, in substance, that if the employes of defendant, by the use of ordinary care and prudence, could have avoided the injury after the danger was or should have been discovered, then the defendant was guilty of negligence. In this view of the case, the contributory negligence of the plaintiff becomes immaterial, and a recovery may be had, notwithstanding the cattle were negligently driven upon the crossing. *Morris v. Chicago, B. & Q. Ry. Co.*, 45 Iowa, 29. It is to be presumed that the evidence submitted to the jury authorized the instructions given by the court, and it does not therefore necessarily follow that the answer to the special interrogatory was inconsistent with the general verdict. The defendant, under the pleadings and instructions, might well have been liable for the injury, notwithstanding the negligence of the person in charge of the cattle. For the same reason, the instructions requested by the defendant were properly refused. It did not follow that the defendant was entitled to a verdict if the plaintiff's son did not look and listen for an approaching train before driving the cattle upon the crossing. We think the judgment of the district court must be

AFFIRMED.

ELLETT V. EBERTS.

74 597
119 455

Promissory Note: CONDITION INDORSED: CONSTRUED TO BE PENAL BOND: LIABILITY ON. Defendant gave to plaintiff a writing which on its face was a promissory note, except that it referred to a "condition specified on back." On the back was written the following language: "This note is given on condition that the signer will cause trustees to assess damages on the eleventh of October, 1886, and costs, done by the hogs of the signer, and now in F. E. Ellett's possession, the award of said trustees to be subtracted from the amount of within note, and remainder of said note to be delivered to the signer on payment of trustees' award." *Held*—

- (1) That the whole writing should be construed together, and that it was, in effect, a penal bond.
- (2) That no recovery could be had by merely setting up the instrument and alleging breach thereof, but that it was necessary to allege actual damages, for which alone a recovery could be had.
- (3) That such actual damages might be recovered upon a failure of the maker to procure an assessment of the damages, even though he made due diligence to have them assessed, but failed only because the trustees had refused to act.

[REED, J., and SEEVERS, C. J., *dissenting.*]

Appeal from Montgomery District Court.—HON. GEORGE CARSON, Judge.

FILED, JUNE 5, 1888.

ACTION at law on a written contract for the payment of a sum of money. The cause was tried to the court, and judgment was entered for defendant. Plaintiff appeals.

J. M. Junkin and Smith McPherson, for appellant.

C. E. Richards and Z. T. Fisher, for appellee.

ROTHROCK, J.—The contract sued on is as follows: “On demand, after date, for value received, I promise to pay to F. E. Ellett, or order, two hundred dollars (condition specified on back), payable at Red Oak, with interest at the rate of ten per cent. per annum until paid. Interest, when due, to become principal, and draw ten per cent. interest. If this note is not paid when due, I promise to pay all reasonable costs of collection, including attorney’s fee, and also consent that judgment may be entered for these amounts by any justice of the peace.” The following condition was indorsed on the back of the instrument: “This note is given on the condition that the signer will cause trustees to assess damages on the eleventh of October, 1886, and costs, done by the hogs of the signer, and now in F. E. Ellett’s possession; the award of said trustees to be subtracted from the amount of within note, and remainder of said note to be delivered to the signer on the payment of the trustees’ award.” The defendant pleaded that the contract was executed on a Sunday; but the court found specially that, although the fact as to the time of the execution was as alleged, defendant had subsequently ratified it on a secular day. He also alleged that there had been a material alteration of the contract after its delivery; but the disposition of the case made by the court implies a finding against defendant on that question. The court found specially that defendant had exercised due diligence to obtain an assessment of the damages, but that the township trustees had refused to proceed to hear and determine the matter of contention recited in the contract; and, as conclusion of law, the court found that the contract is an obligation to abide the award of the township trustees, and that an action could not be maintained upon it until such award was made; and that, as defendant was not in fault as to the failure to procure the award, no breach of the undertaking had occurred.

The material question is as to the effect of the agreement; and that is to be arrived at, of course, upon

Ellett v. Eberts.

a consideration of the language of the condition, as well as that in the body of the instrument. In other words, the writing upon the face of the instrument, and that indorsed thereon, must all be considered as part of the contract between the parties. When thus considered, it is not a promissory note. It is in the nature of a penal bond. If the defendant undertook to have the damages assessed, and failed to perform his obligation, the claim of plaintiff sounded in damages. An action might be maintained upon the contract, not necessarily for the full amount thereof, but to the extent of the damage done by the defendant's hogs to his land and crops. But the plaintiff made no such claim in his pleadings. He demanded judgment for the whole amount specified in the bond or written instrument. He should have pleaded his actual damages for the alleged failure of the defendant to cause the assessment to be made. The effect of the bond was merely to settle the question as to the trespass, and that the plaintiff was entitled to payment therefor. In this view of the case, the plaintiff was not entitled to recover by merely setting up the instrument, and claiming that there was a breach of the conditions; and we think that the claim made by the defendant, that the instrument is in the nature of a penal bond, is correct.

The case is unlike *Green v. Austin*, 7 Iowa, 521, cited by counsel for appellant. The written instrument upon which that action was founded, showed upon its face a full consideration; and the memorandum annexed to it was held not to be a condition, and that, if the whole amount was not due, it was incumbent on the defendant to show that fact by proper evidence. In the case at bar the writing indorsed upon the instrument is expressly declared to be a condition. The case of *Rush v. Carpenter*, 54 Iowa, 132, is distinguishable from the case at bar. In that case the contract was thought to be ambiguous, and the petition set up the circumstances surrounding the parties thereto at the time it was made as proper to be considered in determining the meaning of the writing. The defendant demurred to the petition

Ellett v. Eberts.

upon the following grounds: That the alleged contract, as made out and signed, was unmeaning, and that no application was made to reform the same, and that the alleged contract implied no liability whatever upon the defendant. It was held that the contract might be read in the light of surrounding circumstances, in order to arrive at the meaning and intent of the parties; and that, when these were considered as set forth in the petition, there was no difficulty in arriving at the meaning of the contract. It will be seen that the demurrer in that case was directed solely at the question of ambiguity in the contract. It is true, it is said at the close of the opinion that the defendant, "having failed to do that which made the payment of the contract contingent, the obligation to pay becomes absolute." We may say the same in this case. The obligation to pay became absolute when the defendant failed to have the damages assessed. But this absolute liability is measured, not by the sum of two hundred dollars and interest, but by the actual amount of the damages; and if the declaration in the cited case, that the obligation to pay became absolute, was intended to mean that recovery could be had for the full amount of the written instrument, it determined a question which was not in the case, as will plainly appear by the averments of the petition and the grounds of the demurrer.

It is alleged in the answer in this case that the actual damages did not exceed twenty dollars, and the court finds as a fact that there was evidence tending to prove the averments of the answer. The recovery ought not to be more than sufficient to cover the amount of the injury. The law abhors penalties. If the defendant failed to procure the assessment of damages, his obligation to pay the same is absolute. No question can be raised as to whether the plaintiff wrongfully distrained the defendant's hogs. When the plaintiff brings such an action and makes such claim as is authorized by this instrument, we can see no objection to the maintenance of the same. We think the district court was correct in the conclusion that no recovery could be had in this

Ellett v. Eberts.

action ; but that the conclusion of law should not have been based upon the thought that the defendant had discharged his obligation by attempting to have the trustees appraise the damages. He was bound by his contract to have the damages assessed.

AFFIRMED.

REED, J. (*dissenting.*)—In my opinion, the condition on the back of the instrument has the effect merely to create a contingency on the happening of which defendant might discharge the liability for the damage done by his trespassing animals, by the payment of a less amount than the sum named in the instrument. That, I think, is the only construction of which the instrument is capable, when all of the provisions are considered. The body of the instrument is a promise by defendant to pay two hundred dollars on demand. The condition is that defendant will cause the trustees, on the day named, to assess the damages done by his trespassing animals; and, in case their award should be of an amount less than that named, the note should be surrendered to him upon the payment of that amount. Very clearly, plaintiff's right of recovery is limited by the promise; that is, he could not, in any contingency, recover more than the amount which defendant promised to pay. To that extent, the transaction of the giving of the instrument was a settlement of the matters in controversy. But, in the opinion of the majority, while he bound himself to accept that amount in satisfaction of his claim in any event, he obtained absolutely no advantage by the settlement. At least, that is the logic of the opinion; for, independently of the contract, defendant was liable for the damages, and the parties had the right to have them assessed by the trustees (Code, secs. 1452, 1454, 1455), and an action would lie upon their award. So that, if the construction placed upon the instrument is correct, the effect of the agreement was to limit plaintiff's right of recovery; while in all other respects the rights and liabilities of the parties remained as they were before the settlement. I do not

The State v. Jamison.

believe that they had any such result in contemplation when they made it. And I do not agree that the language in *Rush v. Carpenter*, commented upon by the majority, is *dictum*. The question as to the liability of the defendant under the contract was expressly raised by the demurrer, and that called for the determination of the very question considered by the court in the language in question. In my opinion, the holding in that case is conclusive of the question before us.

SEEVERS, C. J., concurs in this dissent.

THE STATE V. JAMISON.

1. **Embezzlement: INDICTMENT: NATURE OF EMPLOYMENT.** The indictment in this case was found under section 3909 of the Code, which reads as follows: "If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of a copartnership, or if any person over sixteen years of age, embezzle and fraudulently convert to his own use, without the consent of his employer or master, any property of another which has come into his possession by virtue of such employment, he is guilty of larceny, and shall be punished accordingly." *Held* that it was not necessary to allege the particular nature or character of defendant's employment, but that it would have been sufficient to allege generally that he was in the employment of the person named, as clerk, agent or servant. And if, having alleged in the indictment that defendant's employment was of a special character, the prosecution was bound to aver that the money came into his hands by virtue of such special employment, *held* that the indictment (for which see opinion) was not deficient in that regard.
2. ——— : ——— : **CHARGE OF FRAUDULENTLY CONVERTING.** In such case, where the indictment charged that defendant "fraudulently embezzled and converted to his own use" the money, *held* that it was not open to the objection that it did not charge that defendant fraudulently converted the money.

Appeal from Shelby District Court.—HON. H. E. DEEMER, Judge.

FILED, JUNE 5, 1888. .

THE defendant was convicted of the crime of larceny and sentenced to a term of imprisonment in the penitentiary, and he appeals.

Robert P. Foss, for appellant.

A. J. Baker, Attorney General, for the State.

REED, J.—The indictment, omitting its merely formal parts, is in the following language: “The said R. M. Jamison * * * was then and there the agent and employe of one David H. Randall for the purpose of obtaining a loan of money for said David H. Randall, and then and there the said R. M. Jamison, by virtue of his employment as agent and employe of the said David H. Randall, did have, receive, and take into his possession the sum, in money, of three hundred dollars, of the value of three hundred dollars, and of the money and property of the said David H. Randall, the said principal and employer of the said R. M. Jamison aforesaid; and then and there the said R. M. Jamison, without the consent of the said David H. Randall, his principal and employer, as aforesaid, did wilfully, unlawfully, feloniously, and fraudulently embezzle and convert to his own use said sum of three hundred dollars, aforesaid.” Two objections to the sufficiency of the indictment were raised by demurrer, and by motion in arrest of judgment, viz.: (1) That it is not distinctly averred therein that the money which defendant is charged with having converted came into his possession by virtue of the special employment alleged, viz., the employment to obtain for Randall a loan of money; and (2) that it is not averred that defendant fraudulently converted said money. We think neither of these objections is well founded. The statute defining the offense is as follows: “If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of a copartnership, or if any person over the age of sixteen years, embezzle and fraudulently convert to his own use, without the consent of his employer or master, any money or property of another which has come into his possession by virtue of such employment,

1. EMBEZZLEMENT: indictment: nature of employment.

The State v. Jamison.

he is guilty of larceny, and shall be punished accordingly." Under this provision, it was not necessary to allege the particular nature or character of the employment; but it would have been sufficient to aver generally that defendant was in the employ of Randall as clerk, agent or servant, without specifying the particular object or business of the employment. The words "such employment," in the latter part of the section (Code, sec. 3909), relate to the general character of the employment, rather than to the particular business in which the accused was engaged when he received the money or property into his possession. But if it should be conceded that, as the prosecution had averred in the indictment that defendant's agency was of a special character, it was bound to aver that the money came into defendant's possession by virtue of that particular employment, we are of the opinion that the point is sufficiently covered by the averments of the indictment. It is alleged that defendant received the money into his possession by virtue of his appointment, and that it belonged to Randall, "his principal and employer aforesaid." This language is a direct reference to the special employment alleged in the former part of the indictment. Perhaps the reference is not as certain or specific as it could have been made; but, very clearly, it is sufficient "to enable a person of common understanding to know what is intended"; and that is all that is required under the statute. See Code, sec. 4296, subd. 2.

The adverb "fraudulently," as used in the indictment, qualifies the words "embezzled and converted," immediately following it. They are each

2. —:—: descriptive of the act done, and are synonymous, while it is descriptive of the motive with which it was done.

charge of
fraudulently
converting.

These considerations dispose of the questions chiefly relied on by counsel for a reversal of the judgment. The instructions to the jury appear to us to be correct, and the verdict finds sufficient support in the evidence; and the judgment will therefore be

AFFIRMED.

The State v. Wambald.

THE STATE V. WAMBOLD.

1. **Intoxicating Liquors : NUISANCE : INSTRUCTIONS : ERROR WITHOUT PREJUDICE.** The court instructed the jury that "any building or place where any kind of intoxicating liquor is kept for the purpose of sale, or where any kind of intoxicating liquor is in fact sold, is a nuisance," without excepting those cases where such liquors may lawfully be kept and sold by persons duly authorized, and gave other instructions subject to the same objection. But since there was no claim that defendant had license to keep or sell such liquors, *held* that he was not prejudiced by the error.
2. ——— : ——— : **EVIDENCE.** The evidence in this case (see opinion) *held* sufficient to sustain a verdict of guilty of nuisance in keeping for sale and selling intoxicating liquors.

Appeal from Montgomery District Court.—HON. A. B. THORNELL, Judge.

FILED, JUNE 7, 1888.

DEFENDANT was indicted for the crime of nuisance alleged to have been committed by keeping for sale and selling intoxicating liquors contrary to law. The cause was tried to a jury, and the defendant found guilty. From the judgment rendered on the verdict the defendant appeals.

C. E. Richards and S. McPherson, for appellant.

A. J. Baker, Attorney General, for the State.

ROBINSON, J.—I. The district court charged the jury as follows: "Any building or place where any kind of intoxicating liquor is kept for the purpose of sale, or where any kind of intoxicating liquor is in fact sold, is a nuisance, and the keeping of any such place is the keeping of a nuisance. A man may be guilty of keeping a nuisance without ever having in fact sold a drop of any kind of intoxicating liquor, if he keeps and

1. INTOXICATING
liquors: nuisance: instructions: error without prejudice.

The State v. Wambold.

maintains a place where intoxicating liquors are kept for the purpose of sale when opportunity offers." Also, that "the keeping of any kind of intoxicating liquor in any saloon or grocery-store, or any such place, where articles of merchandise are kept for sale, is presumptive evidence that it is kept there for illegal sale, unless the presumption is removed by evidence showing that it is kept for some other and different purpose." These portions of the charge are assailed by appellant, on the ground that they are incorrect as statements of the law. As abstract propositions of law they are no doubt erroneous, in that they do not except those cases where intoxicating liquor may be lawfully kept and sold by one duly authorized so to do by virtue of the law regulating the sale of intoxicating liquors. But, when applied to the facts in this case, there was no possibility of their misleading the jury. The defendant did not claim to be authorized to keep for sale and sell intoxicating liquors, but it was his claim and defence that he had not in fact kept for sale nor sold such liquors. Hence there was no occasion for the jury to determine whether or not the alleged acts of defendant were done under the sanction of the law, and no prejudice could have resulted from the error indicated.

II. It is further insisted by appellant that the verdict is not sustained by the evidence. It sufficiently appears that defendant was in apparent custody and control of the place in question at the time specified in the indictment; that he spoke of it and of what he kept and did there in such manner as to justify the finding that he was its proprietor. It also appears that bottles nearly empty, but containing whisky, were found in his possession; that he was engaged in selling beverages and groceries; that his place of business was furnished with a bar and drinking-glasses, among which were some of a kind commonly used for drinking whisky. Evidence was given tending to show that the whisky and bottles in question were in defendant's place of business without fault on his part, but it was for the jury to determine the facts from all

2. —: —:
evidence.

Bloomfield v. The Burlington & Western Ry. Co.

the evidence submitted, and we are not prepared to say that their verdict was wrong. We discover no prejudicial error in the record, and the judgment of the district court is therefore

AFFIRMED.

**BLOOMFIELD V. THE BURLINGTON & WESTERN
RAILWAY COMPANY.**

74	607
d111	548
74	607
d124	195

Railroads: COLLISION AT STREET CROSSING: CONTRIBUTORY NEGLIGENCE: EVIDENCE. Plaintiff was struck by defendant's engine while driving a gentle horse over the track at a street crossing. For fifty feet before he reached the track defendant's engine, with head-light burning, could be seen by him for a distance of three hundred and fifty feet from the crossing. In view of this physical fact, *held* that his testimony that he looked and listened for an approaching train did not even create a conflict of evidence as to his contributory negligence; and since there was no evidence from which the jury could properly have found that the accident might have been avoided by the exercise of proper care after he discovered the danger, *held* that the verdict for plaintiff could not be sustained.

Appeal from Mahaska District Court.—HON. J. K. JOHNSON, Judge.

FILED, JUNE 7, 1888.

ACTION at law to recover damages for an injury to the person and property of plaintiff by a collision of a locomotive engine with a wagon at a street crossing in the city of Oskaloosa. There was a trial by jury, and a verdict and judgment for plaintiff. Defendant appeals.

Kelly & Cooper and *John F. Lacey*, for appellant.

Carroll & Davis and *Blanchard & Preston*, for appellee.

ROTHROCK, J.—I. There is no dispute that the collision occurred, and that the plaintiff and his wagon and horse were injured. The question is, did the plaintiff show by the evidence that the injury occurred by reason of the negligence of the defendant's employes in running the engine, and without contributory negligence on his part? The case has been tried three times in the court below. At the first trial there was a verdict for the plaintiff, which was set aside. At the second trial the jury failed to agree, and at the trial from which this appeal was taken there was a verdict for the plaintiff for two hundred dollars. We have had occasion to examine many cases of this kind in this court, and appeals are frequently made to us to reverse alleged excessive verdicts and judgments. The right of recovery in this case rests entirely upon the testimony of the plaintiff, and it is evident that the jury gave credence to his testimony as to the right of recovery, and disbelieved him as to the extent of his injuries. There can be no other reason to account for the insignificance of the verdict. We do not think that there was any evidence in the case, not even that of the plaintiff, which warranted a verdict in his favor for any amount. He attempted to cross the railroad track in a one-horse wagon, after dark. The engine with which he came in collision had a head-light brightly burning. This head-light was in full view of the plaintiff when he reached a point fifty feet from the crossing, and from that to the crossing there was nothing to prevent him from seeing it. We mean to say that from a point fifty feet from the crossing he could have seen the head-light on the engine three hundred and fifty feet from the point of observation. It is useless for him to testify that he looked and listened for an approaching engine. His testimony, in the face of an undisputed physical fact of this kind, cannot be said to raise a conflict, and it is to be remembered that there were no complicating circumstances which would excuse the plaintiff from the exercise of his faculties of sight and

Bloomfield v. The Burlington & Western Ry. Co.

hearing. He was driving a gentle horse leisurely along to the crossing, with nothing to distract his attention from using the commonest caution in his approach to the railroad track. The great preponderance of the evidence is to the effect that the collision occurred by the backing of the plaintiff's horse after he had crossed the track. It is true, the plaintiff denies this, and contradicts several witnesses who testified that the plaintiff so stated to them after the accident. His contradiction of these witnesses would probably raise a conflict on this question; but still the fact remains that he could have seen the approaching engine, and avoided the injury of which he complains.

II. But the plaintiff claims that the collision could have been avoided if the engineer, when he saw the danger to which plaintiff was exposed, had taken immediate means to stop the engine. We do not think the evidence authorized a recovery upon this ground. It was incumbent on plaintiff to prove this fact. About all there is to justify the verdict on this ground is certain evidence in the nature of an impeachment of the engineer in charge of the engine. It is questionable whether this evidence should have been allowed to go to the jury in the way it was submitted. The jury must have regarded it as original evidence of the fact rather than merely impeaching evidence.

We have thus disposed of this case in a very general way. We have not thought it necessary to discuss nor even mention the legal questions presented in argument by counsel. An examination of the evidence leads our minds to the conclusion that it is wholly insufficient to support a verdict for the plaintiff in any sum, or on any ground.

REVERSED.

THE STATE V. WALTZ.

Intoxicating Liquors : NUISANCE : INDICTMENT : DESCRIPTION OF PROPERTY. An indictment charging the crime of nuisance by keeping a place for the unlawful sale of intoxicating liquors is good in the absence of averments particularly describing the place, house or building in which the nuisance is maintained ; but while, upon a verdict of guilty upon such an indictment, the offender may be punished by a fine, no order for the abatement of the nuisance can be made.

Appeal from Muscatine District Court.—HON. W. F. BRANNAN, Judge.

FILED, JUNE 7, 1888.

DEFENDANT was indicted for the offense of keeping a nuisance by maintaining a saloon for the unlawful sale of intoxicating liquors. A demurrer to the indictment was sustained, and defendant discharged. The state appeals.

A. J. Baker, Attorney General, for the State.

J. J. Russell, for appellee.

BECK, J.—I. The parts of the indictment necessary to be set out here are in the following language : “The grand jury of the county of Muscatine, in the name and by the authority of the state of Iowa, accuse F. J. Waltz of the crime of nuisance, committed as follows: The said F. J. Waltz, on the tenth day of November, A. D. 1886, in the county aforesaid, wilfully and unlawfully did use a certain building, known as a ‘saloon,’ for the purpose of selling therein, and therein did sell, intoxicating liquor of the kind prohibited by law, to-wit, whisky, brandy, rum, gin, ale, wine and beer, to divers persons, and did then and there, by the means aforesaid, keep and maintain a public and common

74	610
84	625
74	610
99	44
74	610
104	743
74	610
109	112

nuisance, to the manifest corruption of good morals, contrary to the provisions of the Code of Iowa in such cases made and provided, and against the peace and dignity of the state of Iowa." The demurrer sustained is in this language: "Comes now the defendant in the above-entitled case, and demurs to the indictment herein filed, for the reason and on the ground that defendant is charged in said indictment with unlawfully using a certain building for the purpose of selling therein intoxicating liquors, and thereby keeping and maintaining a common and public nuisance; and under the law upon which said indictment was founded and based, the proceeding is one in which it is contemplated and intended to affect the certain premises in which said alleged nuisance is said to be maintained; and nowhere in said indictment is there to be found a correct description of said premises where said nuisance is said to exist, nor is there any description whatever of said premises in said indictment." We are required to determine whether an indictment charging the crime of nuisance by keeping a place for the unlawful sale of intoxicating liquors is good in the absence of averments particularly describing the place, house or building in which the nuisance is maintained. It appears to be the settled rule of the books that such an indictment is sufficient, unless the locality in which the act causing or creating the nuisance is a necessary ingredient of the crime, in that the act would not cause the nuisance if done elsewhere, or is essential to the identity of the offense, or the nuisance is to be abated upon conviction of the accused. 2 Bish. Crim. Proc. secs. 111, 866, and notes; Whart. Crim. Pl. sec. 155; 2 Archb. Crim. Pr. & Pl. 980; 2 Whart. Prec. Ind. 719.

II. This court has held that indictments for nuisances committed by keeping places for the sale of intoxicating liquors are good without averments precisely describing the *locus* of the offense. *State v. Kreig*, 13 Iowa, 462; *State v. Schilling*, 14 Iowa, 455; *State v. Freeman*, 27 Iowa, 333. The indictments in these cases were all found under the statute in force when the

The State v. Waltz.

indictment in this case was found. This observation is intended only to apply to the statute so far as it declares that the keeping of a place for the sale of intoxicating liquors, for purposes not authorized by law, is a nuisance, and may be punished by indictment. Amendments thereto, and changes therein, pertaining to the punishment of the offense, and authorizing proceedings for abatement of the nuisance, have been enacted. Chapter 45, Acts Fifth General Assembly, forbids the manufacture, keeping and sale of intoxicating liquors, except as permitted therein, and in a separate section declares that, in case of the violation of the prohibitory provisions of the act, the building or place in which the intoxicating liquors are sold or kept shall be regarded as a nuisance, and abated as such. This statute was embodied in the Revision of 1860, and substantially reenacted in the Code of 1873. Chapter 143, Acts Twentieth General Assembly, amends the statute as to the provisions relating to the offense, and declares that the furniture, fixtures and contents of a building used for the unlawful sale of intoxicating liquors, as well as the building itself, shall be regarded as a nuisance. It also prescribes a fine to be assessed upon conviction for the offense, and declares that the nuisance may be abated by injunction in proceedings authorized by the act. Chapter 66, Acts Twenty-first General Assembly, amends the statute last named, increasing the punishments, and broadening its provisions as to injunctions to restrain nuisances, and in some other respects which need not be here particularized. It further provides that if the existence of the nuisance be established, either in a criminal or equitable action, it shall be abated under an order of the court.

III. It will be observed that, under the statute applicable to the case before us, one charged with the offense of nuisance contemplated by it may be indicted, and upon the indictment he may be fined, and the nuisance may be abated. Now, if it be assumed that the order of abatement cannot be made in the absence of allegations in the indictment particularly describing the

The State v. Jamison.

locus of the nuisance, it does not follow that the offender may not be punished by fine upon conviction under such an indictment. The statute declares that he may be fined upon conviction. It prescribes further proceedings after conviction under such an indictment, to the end that the nuisance be abated. Now, if the order of abatement cannot be made in the absence of averments as to the *locus*, the court, upon conviction, will render judgment for the fine, regarding the indictment as not presenting a case for abatement of the nuisance. It will be presumed that the state sought in the prosecution nothing further in the way of punishment than a fine upon defendant. The statute provides for the fine; the indictment alleges sufficient facts to support a judgment therefor. It does not allege facts sufficient to support an order for abatement. The case will be regarded, then, as one in which the state seeks a conviction and a fine, and nothing more, and for that purpose the indictment is sufficient. We therefore conclude that the judgment of the district court ought to be

REVERSED.

THE STATE V. JAMISON.

1. **Criminal Law : FRAUDULENTLY OBTAINING SIGNATURE : DELIVERY TO AGENT : INDICTMENT.** Where one is indicted, under section 4073 of the Code, for obtaining by false pretense, and with intent to defraud, the signature of a person to a written instrument the false making of which would be punished as forgery, it is necessary to allege the delivery of the instrument signed (*State v. McGinnis*, 71 Iowa, 685) ; and where the indictment charged that defendant was a loan agent employed to make a loan to S., and in the transaction fraudulently procured the signature of S., and that S. delivered the instrument to defendant, *held* that the indictment did not allege that defendant was the agent of S., and it was not therefore open to the objection that it did not charge a delivery of the instrument, on the ground that a delivery to an agent is no delivery.

74	613
88	28
74	613
96	298
100	196
74	613
104	19
74	613
1109	76
74	613
118	75
74	613
119	687

The State v. Jamison.

2. ——— : ——— : MORTGAGE : INDICTMENT : AVERMENT OF OWNERSHIP OF LAND. To fraudulently obtain the signature of a party to a mortgage containing the ordinary covenants is an offense under section 4073 of the Code. And an indictment which sets out a copy of the mortgage showing the covenants is not bad because it fails to allege that the person whose signature was fraudulently obtained owned the land.
3. ——— : ——— : ACTUAL DEFRAUDING NOT NECESSARY. In such case, while there must be a delivery of the instrument signed in order to consummate the intent to defraud, the actual consummation of the intended fraud need not be shown.
4. ——— : ——— : EVIDENCE OF SIMILAR OFFENSE. In such case, since the gist of the alleged crime is the *intent*, evidence of the commission of another similar crime against the same person was admissible as bearing only on the question of intent. (Compare *State v. Walters*, 45 Iowa, 389, and *State v. Saunders*, 68 Iowa, 370.)
5. ——— : ——— : EVIDENCE : CHANGING PAPERS TO CONCEAL CRIME. In such case, evidence tending to show that defendant altered papers pertaining to the alleged fraudulent transaction for the purpose of concealing the fraud was competent and material.

Appeal from Shelby District Court.

FILED, JUNE 7, 1888.

INDICTMENT for cheating by false pretenses. Trial by jury, verdict guilty, and judgment. The defendant appeals.

Robert P. Foss, for appellant.

A. J. Baker, Attorney General, for the State.

SEEVERS, C. J.—I. It is contended that the indictment is insufficient, and does not charge an offense prohibited by the statute, which provides: "If
 1. CRIMINAL law: fraudulently obtaining signature : delivery to agent : indictment. any person, by false pretense, * * * and with the intent to defraud, obtain * * * the signature of any person to any written instrument, the false making of which would be punished as forgery," he shall be punished, etc. Code, sec. 4073. The indictment charges, in substance, that the defendant was a loan agent, employed to make a loan of the sum of three hundred dollars to

The State v. Jamison.

one Charlotte A. Swift, the same to be obtained from the Davenport Savings Bank, and that he falsely pretended and represented that a certain mortgage, a copy of which is set out in the indictment, was to secure the payment of three hundred dollars, when in fact it was for four hundred dollars, and thereby created a lien on the lands described in the mortgage for the last-named amount; and thereby, with intent to defraud, procured the signature of the said Charlotte A. Swift to said mortgage, and she delivered the same to defendant. The indictment is quite lengthy, but the foregoing statement of its averments is sufficient for the purpose of a consideration of the objections made thereto. It is insisted that the defendant was the agent of Mrs. Swift, for the purpose of procuring the loan, and that the delivery of the mortgage to the defendant as her agent is not such a delivery as is required; and it is said that Mrs. Swift could, at any time, have recalled the mortgage, and taken it into her personal possession, and therefore there in fact was no delivery, for the reason that the possession of an agent is the possession of the principal. Counsel cite and rely on *State v. McGinnis*, 71 Iowa, 685. All that is decided in that case is that there must be a delivery of the instrument obtained by false pretenses. It will be observed that the indictment does not state that the defendant was the agent of Mrs. Swift, but simply that he was a loan agent, employed to make a loan of the sum of "three hundred dollars, to one Charlotte A. Swift." Therefore it seems to us that the position of counsel cannot be sustained. The indictment, in our opinion, is clearly sufficient, in so far as the objection under consideration is concerned.

II. It is objected that the indictment is insufficient, because it fails to state that the land described in the mortgage belonged to Mrs. Swift. But the

2. —:—:
mortgage:
indictment:
averment of
ownership of
land.

defendant, by false pretenses, obtained the signature to an instrument the false making of which would have been forgery, for the reason that Mrs. Swift covenanted in the mortgage that she had "good right to sell and convey"

The State v. Jamison.

the premises described in the mortgage; that the same were free from incumbrance; and that she would warrant and defend said premises against the lawful claims of all persons whomsoever. It is provided by statute that if any person, with intent to defraud, "falsely * * * make any instrument in writing, * * * purporting to be the act of another, by which any pecuniary demand or obligation is created," he shall be deemed guilty of forgery. Code, sec. 3917. It is clear that under this statute, if Mrs. Swift's name had been signed to the mortgage by the defendant with the intent to defraud, he would have been guilty of forgery; and the fact whether Mrs. Swift owned the land or not would have been immaterial, for the reason that under the covenants of the mortgage a pecuniary liability was created against her.

III. The court instructed the jury that "there must be an intent to defraud, but actual defrauding is not necessary to be shown, provided the intent be proven." It is said by counsel that this instruction is erroneous, for the reason that the fraud must be consummated, and that an intent is not sufficient. He cites and relies on *People v. Wakely*, 62 Mich. 297, and *State v. McGinnis*, heretofore cited. We understand the instruction to mean that it is not essential that any person should have been actually defrauded, but it is essential, if a written instrument is the thing obtained, that it should be delivered; for until this is done the intent to defraud is not consummated, for the reason that, until there has been a delivery, the instrument creates no liability. The provision of the statute is that the thing, whether a chattel or a written instrument, must be obtained by the person making the false pretense, and this is the effect of the holding in the two cases above cited, referred to by counsel. But no case to which our attention has been called holds that any person must have been actually defrauded, that is, have suffered a pecuniary loss; and under the statute an intent to defraud only is required.

The State v. Jamison.

Therefore the court did not err in giving the instruction referred to.

IV. The court instructed the jury as follows: "The fact, if you should find it to be a fact, that the defendant committed a like crime to the one <sup>4. —: —: evi-
dence of sim-
ilar offense.</sup> with which he is charged in the indictment against Mrs. Swift, * * * prior to the time the acts in question were committed, is admitted in evidence for the purpose of aiding you in determining the question as to the defendant's intent in doing the acts complained of, and you should only consider it for that purpose." There was evidence tending to show that the defendant had procured, with intent to defraud, from Mrs. Swift another mortgage, which he represented to be for seven hundred dollars, when in fact it was for eight hundred dollars, and it is upon this evidence, which we have only partially stated, that the foregoing instruction is based. It is objected that the instruction states that the defendant had committed a like crime to that charged in the indictment; but we think this is a mistake, and that such question was submitted to the jury, who were required to find whether the defendant had committed such a crime. It is further objected that evidence tending to show the commission of a like crime "against the same person" was inadmissible, and that the court erred in giving the instruction, for the reason that the defendant cannot be convicted of the crime charged by proof showing the commission of another crime, and that no such question should have been submitted to the jury. The gist of the crime charged in the indictment is the intent to defraud, and the settled rule seems to be that, when the *scienter* or *quo animo* is requisite to and constitutes a necessary and essential part of the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct or declarations of the accused, as tend to establish such knowledge or intent is competent, notwithstanding they may constitute a distinct

The State v. Jamison.

crime.” Amer. Crim. Law [5 Ed.] sec. 649. In *People v. Henssler*, 48 Mich. 49 ; s. c., 11 N. W. Rep. 804, such evidence was held admissible in a case where the crime charged was obtaining the indorsement of a note by false pretenses, with intent to defraud ; and in *State v. Walters*, 45 Iowa, 389, where the crime charged was an intent to commit a rape. See, also, *State v. Saunders*, 68 Iowa, 370. It will be observed that the evidence introduced and the instruction have reference to a similar crime in all respects. The party whose signature was obtained was the same, and so was the instrument ; and therefore the admission of the evidence and instruction is supported by all the authorities. What the rule would be if the signature of a different person to an instrument of a different character had been obtained we have no occasion to determine.

V. Evidence was introduced tending to show that both the mortgage referred to in the indictment, and also the prior mortgage, was negotiated to the Davenport Savings Bank by the defendant ; and he obtained money thereon from said bank to the amount of four hundred dollars upon one mortgage and eight hundred dollars on the other. The defendant, however, gave Mrs. Swift three hundred dollars of the former and seven hundred dollars of the latter. The notes secured by the mortgages bore interest at eight per cent., and coupons were attached thereto for interest at that rate on four hundred and eight hundred dollars. Mrs. Swift paid such interest to the defendant upon the basis that the notes were for three hundred and seven hundred dollars. He remitted such money to the bank, but added thereto sufficient of his own money to pay the coupons, and when the coupons were received by him he altered the same, so that they represented the amount of money paid him by Mrs. Swift, and then delivered the coupons to her. At least, there was evidence so tending ; and counsel for the defendant contend that it was inadmissible, for the reason that it did not tend to establish the crime charged. But we think otherwise.

5. —: —: evidence: changing papers to conceal crime.

McDonnell v. Henderson.

The evidence had an important bearing on the question of intent.

We are unable to discover any error in the record, and therefore the judgment must be

AFFIRMED.

MCDONNELL v. HENDERSON, JUDGE.

1. **Contempt : JURY TRIAL.** A person held to answer for a contempt is not entitled to a trial by jury.
2. **Execution : AUXILIARY PROCEEDINGS : NOTICE TO DEFENDANT.** When the defendant is present in court at all stages of a proceeding auxiliary to execution for the purpose of discovering property, an order made will be binding on him without its being reduced to writing and signed by the judge and personally served.
3. **_____ : _____ : EXAMINATION OF DEFENDANT : AFFIDAVIT AS BASIS OF.** Where a defendant is examined for the discovery of property in a proceeding auxiliary to execution, and a second examination is had which is but a continuation of the first, a new affidavit is not required by section 8186 of the Code.

Original proceeding on certiorari.

FILED, JUNE 7, 1888.

McGarry & Brown, for plaintiff.

W. H. Berry and H. McNiel, for defendant.

ROTHROCK, J.—It appears from the petition for the writ of *certiorari*, and from the return made thereto by the defendant, that the plaintiff is confined in the jail of Warren county upon a commitment for an alleged contempt in refusing to pay over certain money, claimed to be in his possession, in satisfaction of two judgments against him. The judgments were duly and regularly rendered against the defendant, and executions were issued thereon and returned unsatisfied. Thereupon, upon proper proceedings, the plaintiff was required to appear before the district court of Warren county for an examination touching the question as to whether he

74	619
104	53
74	619
119	678

74	619
126	353

McDonnell v. Henderson.

had any property which he unjustly refused to apply towards the satisfaction of the judgment. The proceedings were had under chapter three, title eighteen, Code. Plaintiff appeared, and, upon his examination, it appeared that he had money more than sufficient to satisfy the judgments, and that said money was in his house, and in the actual possession of his wife. An order was made that the wife pay over a sufficient amount of said money to the sheriff to satisfy the debt and costs, and that the plaintiff herein should not, in any manner, either directly or indirectly, interfere with the money in the hands of his wife, or in any manner prevent the payment of said money by his wife to the sheriff. The plaintiff was present when this order was made, and excepted thereto, and on the same day he filed a motion to set aside the order. The record shows that this order was served upon the wife, and was read by the sheriff to the plaintiff. The wife did not deliver the money to the sheriff, and could not well do so, because the plaintiff, after the order was made, and before it was served, had taken the same into his own possession, in violation of the order. Some proceedings were had looking to an examination of the wife touching the possession of the money, but, owing to her sickness, she was not required to appear before the court. An order was made for the plaintiff to appear for further examination; and, the plaintiff being present in court, he was ordered to appear for examination forthwith, to which order he excepted. A further examination was had, upon which the court found that the plaintiff had under his control a sufficient amount of money to pay the judgment and costs, and he was ordered to pay the same within three days, and that, if he failed to do so, to be considered in contempt of court. This order contained the following recital: "And the said Peter McDonnell, now being in court, is required to observe and obey this order, as hereinbefore provided, without further notice." An exception was entered to this order. At the expiration of the time fixed for the payment of the money, the plaintiff

appeared and filed an affidavit in alleged excuse of his refusal to comply with the order. A cause was docketed against the plaintiff in the name of the state, entitled contempt proceeding, and thereupon the plaintiff demanded a jury, which demand was denied, and he excepted. The plaintiff, being in court, was required to answer, and show cause why he should not be punished for contempt. Thereupon the plaintiff read in evidence his affidavit in excuse, above referred to. The sheriff was examined as a witness touching the conduct of the plaintiff in violation of the former order of the court. Thereupon the court made an order, stating the facts attending the investigation, and it is therein recited that, after hearing the testimony, and from knowledge of the facts transpiring in open court, it was found that the plaintiff herein was in contempt in not obeying the order to pay over the said money, and it was adjudged that he be confined in the jail of Warren county until he should comply with said order.

The first objection made by the plaintiff to the proceedings is that he was denied the right of trial by jury. He contends that such right is
1. **CONTEMPT :** secured to him by the rule announced in
jury trial. the case of *Eikenberry v. Edwards*, 67 Iowa, 619. That case does not determine that a person held to answer for a contempt is entitled to trial by jury. Contempt proceedings cannot legally be tried by jury. The plaintiff did not demand a jury to try the issue made by the special statutory proceeding, to determine whether he had money or property in his possession which he should of right apply to the payment of the judgment. That was an issue to be tried by the examination of the plaintiff under oath, and witnesses could have been summoned to appear and testify upon the question in issue. Code, sec. 3139. Whether the proceeding should be regarded as at law, with the right of trial by jury, we need not determine in this case, because no jury was demanded for the trial of that issue.

It is further contended that the court acted illegally

McDonnell v. Henderson.

in proceeding against the plaintiff, because he was not served with a written order signed by the judge, as required by section 3146, Code. The whole record in the case shows that the plaintiff was present at every stage of the proceeding, and we have recited the facts quite fully, for the purpose of showing that the plaintiff was not condemned without notice, and an opportunity to be heard, and to purge himself of the contempt if he could do so. It would have been a needless form to serve him with the orders made when he was personally present in court when they were made, and excepted thereto. He appeared and filed his affidavit in excuse for failure to pay over the money, and he was given a full, and, so far as we can see, a fair, hearing.

It is claimed that the court acted illegally in requiring the plaintiff to submit to a second examination without an affidavit, as required by section 3136 of the Code. The fact that the second examination was but a continuation of the first examination is a sufficient answer to this ground of complaint. We have said that there were two judgments against the plaintiff, and we have recited the proceedings as to one. The action taken upon the other was substantially the same, and in the final order the defendant was required to deliver up sufficient of the money in his possession to satisfy both. Our conclusion is that the district court did not in any respect exceed its jurisdiction, or otherwise act illegally, in the proceeding under consideration, and that the judgment in contempt is correct, and fully sustained by the evidence, and that this proceeding in *certiorari* should be dismissed; and it is so ordered.

DISMISSED.

The State v. Porter.

THE STATE V. PORTER.

1. **Criminal Law: WITNESS NOT EXAMINED BEFORE GRAND JURY.** The state offered on the trial a witness who had not been before the grand jury. She had written a statement of what she would testify to, and sent that to the grand jury, and the same was attached to the indictment, and purported to be evidence taken before the grand jury; and her name was indorsed on the back of the indictment. *Held* that the admission of her testimony was error, under section 4421 of the Code.
2. **Witnesses: IMPEACHMENT: CORROBORATION.** A witness may be impeached by showing that he made statements out of court contradictory to his evidence as a witness; but evidence that he made statements out of court in harmony with his evidence is not admissible in rebuttal, for the purpose of corroboration.
3. **Criminal Evidence: STATEMENTS OF DECEASED WITNESS BEFORE GRAND JURY.** A grand jury which sat prior to the one which found the indictment in this case made inquiry as to who committed the crime charged herein, but found no indictment. At that inquiry one H., who died before the trial, was present as a witness and gave testimony, but no attorney for the state was present. The defendant in this case sought to prove by a member of that former grand jury what H. said in his testimony. *Held* that the offered evidence was properly excluded. Whether the case would be different had the attorney for the state been present when the testimony was given, *quaere*.
4. **Criminal Law: ALIBI: INSTRUCTION.** Where there is evidence tending to establish an *alibi*, a proper instruction in relation thereto should be given, especially when asked.
5. **Instruction: NO EVIDENCE TO SUPPORT.** An instruction that defendant could be convicted if he aided or assisted in the commission of the murder charged was erroneous, where the evidence showed that, if he was guilty at all, he fired the fatal shot, and did not assist another.
6. **———: INDICATING EFFECT OF TESTIMONY.** It was error for the court in an instruction to speak of "circumstances introduced in evidence tending to connect the accused" with the offense charged in the indictment, since it was for the jury alone to determine the tendency of the evidence.

74	623
91	506
74	623
94	707
74	623
98	666
74	623
105	43
74	623
107	351
107	354
74	623
d108	26
74	623
129	706

The State v. Porter.

Appeal from Webster District Court.—HON. D. D. MIRACLE, Judge.

FILED, JUNE 7, 1888.

INDICTMENT for murder in the first degree. Trial by jury. Verdict, guilty of manslaughter; and judgment thereon. Defendant appeals.

M. D. O'Connell and *Dolliver & More*, for appellant.

A. J. Baker, Attorney General, for the State.

SEEVERS, C. J.—I. Mary Blakely was introduced as a witness for the state. Her name was indorsed on the back of the indictment, but she was not examined as a witness before the grand jury. She wrote a statement of what she would testify to, and sent that to the grand jury, and the same was attached to the indictment, and purported to be evidence taken before such jury. The defendant objected to the witness' testifying, because she had not been examined by or testified before the grand jury. The objection was overruled, and the defendant excepted. It is provided by statute that the state "shall not be permitted to introduce any witness who was not examined before the grand jury, and whose evidence was not taken down by the clerk of the grand jury, and presented with the indictment." Code, sec. 4421. As Mrs. Blakely was not a witness before the grand jury, the court ignored and disregarded the express words of the statute, and erred, we think, to the defendant's prejudice. It is impossible to know the effect which the statement made by Mrs. Blakely, not under oath, had upon the grand jury. If she had been examined before such jury, her evidence might have been so materially different from the statement that no indictment would have been found. Besides this, a disregard of the material portion of the statute, which is of a mandatory character, must be conclusively presumed to be prejudicial.

1. CRIMINAL
law : witness
not examined
before grand
jury.

II. Ira Vail was examined as a witness on the part of the state, and gave evidence tending to show that the defendant, in a conversation, had made certain statements of a material character.

2. WITNESSES: impeachment. corroboration. The defendant introduced evidence tending to show that Vail, on more than one occasion, denied that defendant had made any such statements. The state in rebuttal, against the objection of the defendant, was permitted to prove by the wife of said Vail that he had told her, shortly after or before the homicide, that the defendant had made such statements. That a witness may be impeached by showing that he made statements out of court contradictory to his evidence as a witness is the well-settled rule; but evidence that he had made such statements, for the purpose of corroborating his evidence as a witness, is not, we think, admissible. We are of the opinion that there is no authority which supports the ruling of the court, and upon principle we think it cannot be sustained, for the reason that the evidence is clearly hearsay.

III. Prior to finding the indictment under consideration, and at a previous term of court, a grand jury investigated and made efforts to ascertain who had killed the deceased, but no indictment was found. Witnesses were examined, and, among others, one Hollis, who had deceased prior to the trial, who gave evidence before the grand jury; but there is no evidence tending to show that any attorney representing the state was present at the time. The defendant offered to prove by one of the grand jurors what said witness testified to before such jury. To this the state objected, and the objection was sustained. In so holding we do not believe the court erred. This is a case of first impression. No authority has been cited in favor of or against the ruling of the court. That evidence of a deceased witness given on a trial may be shown on a subsequent trial, or where the evidence of such person has been

3. CRIMINAL evidence: statements of deceased witness before grand jury.

given before an examining magistrate, upon a preliminary inquiry as to whether there are reasonable grounds for believing a named person has committed a specified crime, is well settled. But there was not in this case any person charged with this crime. The grand jury were simply investigating and inquiring who was the guilty person. In performing their duties, evidence was elicited which, it will be conceded, had a tendency to show that the defendant was not the guilty person. But as he was not charged, and was not a party to the inquiry, we do not think he can show, when he is on trial upon an indictment subsequently found, that evidence material to his defense was given by a deceased witness before some prior grand jury who were endeavoring to ascertain who had committed the crime with which he is charged. Originally, provision was made for a grand jury as a barrier to the arbitrary star-chamber encroachments of the crown upon the rights of the citizen. It is simply a court of inquiry, and, under the statute, in performing its duties, may call any person before it, whether favorable or unfavorable to the prosecution. The evidence is usually given in a narrative form, and of a meager character. It is certain that the state could not introduce the evidence of a deceased witness given before a grand jury upon the trial of any person for an offense, for the reason that the right to cross-examine the witness did not exist. While the state may be represented before the grand jury by the prosecuting attorney, it was not so represented in this case. We therefore have no occasion to determine whether the evidence offered would be admissible if he had been present and taken part in the proceeding.

IV. There was evidence introduced tending to establish an *alibi*, and the court refused an instruction upon that question. The instruction asked, or one of similar import, should have been given. Complaint is made that the court instructed the jury that the defendant could be convicted if he aided or assisted in the commission of the

4. CRIMINAL
law : alibi:
instruction.

The State v. Porter.

5. INSTRUCTION:
no evidence
to support.

homicide, and there is no evidence tending to show that he did so. This is true, for the defendant, if guilty, fired the fatal shot, and did not aid or assist any other person in so doing. Upon another trial, unless the evidence is materially different, no instruction like that above stated should be given.

6. — : Indi-
cating effect
of testimony.

V. The court said to the jury that, “in determining upon the character and weight to be given to the circumstances introduced in evidence tending to connect the accused” with the offense charged in the indictment, they should consider certain things or matters, to which the attention of the jury was called in a lengthy instruction. It was for the jury to say whether the evidence tended to connect the defendant with the crime charged, and therefore the court, no doubt inadvertently, usurped the province of the jury. There are other instructions which are criticised by counsel, which we do not deem it necessary to set out, or more particularly refer to, for the reason that upon another trial the criticisms of counsel will, no doubt, be considered by the court, and proper instructions given. The defendant did not testify in his own behalf, and we are constrained to say, in view of a new trial, that counsel for the state, in addressing the jury, made use of language which, it seems to us, had the tendency, though possibly not purposely so intended, to prejudice the defendant, because he had not testified in his own behalf. This is prohibited by statute, and counsel should refrain from so doing upon another trial.

It is insisted that the verdict is not sustained by the evidence. After much reflection, we have concluded, as there must be a reversal for other reasons, and as the evidence may be different on another trial, that we should not express any opinion on this subject.

REVERSED.

THE STATE V. BLANCHARD.

1. **Appeal: CRIMINAL CASE: PRESUMPTION IN FAVOR OF JUDGMENT.** On the appeal of a criminal cause, where the evidence is not brought up, it will be presumed that every fact necessary to warrant the judgment was proved by competent and undisputed evidence.
2. **Forgery: INDICTMENT: VARIANCE.** Where the forged instrument was dated January 7, 1885, but the copy set out in the indictment showed it to be dated January 7, 1884, the court properly instructed that the variance was immaterial.
8. **——: PLACE OF CRIME: EVIDENCE.** The fact that the forged instrument purported to have been executed in Mitchell county, and that defendant had it in his possession in that county at about the time it purported to have been executed, was competent evidence, and, in the absence of anything to the contrary, sufficient, to prove that the forgery was committed in that county.

Appeal from Mitchell District Court.—HON. JOHN B. CLELAND, Judge.

FILED, JUNE 7, 1888.

F. F. Coffin and *L. M. Ryce*, for appellant.

A. J. Baker, Attorney General, for the State.

REED, J.—This cause was submitted without argument by counsel for either party. The transcript contains the indictment, verdict, motion for a new trial, and the judgment pronounced by the court; also the instructions given by the court on his own motion, and certain instructions asked by counsel for defendant, but which the court refused to give; but the evidence introduced on the trial has not been brought into this court. The only suggestions which we have as to the grounds relied upon for a reversal of the judgment are contained in the motion for a new trial. The instrument which defendant is accused of having forged purports to be an order

1. **APPEAL:**
criminal case:
presumption
in favor of
judgment.

The State v. Blanchard.

for the payment of a sum of money, drawn upon the treasurer of Osage Lodge, No. 195, I. O. O. F., to which the names of "Theo. Cane, N. G.," and "C. H. Cleveland, Secy.," are signed. One of the grounds of the motion for a new trial was that the instructions given by the court to the jury erroneously assumed that the corporate character of said lodge was established. If it should be conceded that it was necessary to prove that fact, we could not reverse the judgment on this ground; for, in the absence of the evidence, we will presume, in favor of the correctness of the ruling of the district court, that the fact was proven by competent and undisputed evidence.

The forged instrument purported to be dated at Osage, Iowa, January 7, 1885. The copy set out in the indictment showed it to be dated January 7, 1884. The district court instructed that the variance was not material. The instruction is correct. The defendant could not have been prejudiced by the variance between the allegation and the proof as to the date of the instrument.

The court also instructed that the facts that the instrument purported to have been executed in Mitchell county, and that defendant had it in his possession in that county at about the time it purports to have been executed, were competent evidence to be considered by the jury in determining whether the offense was committed within the county. This instruction is also clearly right. The fact that the offense was committed within the jurisdiction of the court, like any other fact in the case, may be proven by circumstantial evidence; and the circumstances enumerated in the instruction, which we must assume were proven, tended to prove that fact, and, in the absence of anything to the contrary, were sufficient to establish it. See 3 Greenl. Ev. sec. 112, and cases cited in the note. We have examined the record on which the cause was submitted with care, and we find no ground for disturbing the judgment.

AFFIRMED.

LEATHERS et al. v. ROSS et al.

74	630
126	517

1. **Real Estate : ACTION TO RECOVER : MINORS' LAND SOLD BY FATHER : RATIFICATION : EVIDENCE : TAXES PAID BY PURCHASER.** A father purchased a section of land with his wife's money, and had a quarter-section of it conveyed to each of their four minor sons, who are plaintiffs herein. Afterwards, and while plaintiffs were yet minors, he conveyed the land to defendants in exchange for other land, a portion of which was conveyed to one C., who afterwards, for a named consideration, conveyed it to plaintiffs. Plaintiffs and defendants entered into possession of the lands which came to them respectively under these transactions, and defendants paid taxes on the lands which they thus claimed to own. This action was to recover the land conveyed by the father to defendants. *Held*—
 - (1) That if C. was a mere conduit for passing the title from defendants to plaintiffs of the land which C. conveyed to them, and plaintiffs accepted and disposed of this land, knowing that it was the consideration which defendants had paid for the land in question, this would be a ratification of their father's act in making the exchange, and that they could not recover; but
 - (2) That, in order to defeat plaintiffs' recovery on their legal title, it was necessary for defendants to prove these facts by clear and satisfactory evidence, which they have failed to do.
 - (3) That, since defendants paid taxes on the land in good faith, believing that they were the real owners, they were entitled, upon a decree being entered for plaintiffs for the lands, to a judgment for such taxes with interest, the same to be a lien on the land.
2. **Evidence : TRANSACTIONS BETWEEN PERSONS DECEASED.** In an action to recover land which plaintiffs' father traded to defendants' brother for other lands, where the father and brother and an intermediate owner were all dead, *held* that one of the defendants was incompetent to testify to the personal transactions between the persons deceased. (Code, sec. 3639.)
3. **Deposition : OBJECTING TO INCOMPETENT EVIDENCE : TIME.** Where a witness in a deposition gave incompetent testimony, because relating to transactions with one deceased, but the adverse party did not know of the decease until the examination in chief had closed, and he then made the objection, and afterwards, six months before the trial, he moved the court to strike out the objectionable testimony, *held* that the objection was made in time.

Appeal from Hancock Circuit Court.—HON. JOHN B. CLELAND, Judge.

FILED, JUNE 8, 1888.

THIS is an action in chancery, and involves the title and ownership of six hundred and forty acres of land in Hancock county. There was a decree for defendants, and plaintiffs appeal. The facts appear in the opinion.

A. C. Ripley and Laughlin & Campbell, for appellants.

Brockway & Elder and E. B. Soper, for appellees.

ROTHROCK, J.—I. The legal title to the land is in plaintiffs. They brought actions to recover possession and quiet their title as against defendants. The record of title shows that each of the four plaintiffs is the owner of one-fourth of the land. The four actions were consolidated, and the defendants answered, setting up their equitable claim to all of the lands, and there was but one trial in the court below. The claim made by the defendants is that the plaintiffs, who are brothers, were once the legal and equitable owners of the property, and that, while they were yet minors, Danford Eddy, their father, exchanged and conveyed the land in controversy to the defendants for two hundred and forty acres of land in Ringgold county, and caused the said Ringgold county land to be conveyed to the plaintiffs; and that the plaintiffs, knowing that such an exchange was made, and the consideration therefor, accepted the land in Ringgold county, and used, sold and conveyed the same; and that they are thereby precluded from asserting title to and ownership of the land in controversy, as against the defendants.

There can be no question that, if the claim made by the defendants is shown to be true, the plaintiffs cannot

1. REAL estate :
action to re-
cover : mi-
nors' lands
sold by fa-
ther : ratifica-
tion : evi-
dence : taxes
paid by pur-
chaser.

Leathers v. Ross.

recover the land. If one person assumes to sell and convey the land of another, and the owner, with a knowledge of the facts, receives the consideration, and appropriates it to his own use, he cannot be allowed to question the transaction. See *Stroble v. Smith*, 8 Watts, 280; *Com. v. Shuman's Adm'r*, 18 Pa. St. 343; *Smith v. Warden*, 19 Pa. St. 424; and *State v. Stanley*, 14 Ind. 409.

Counsel for defendants cite and rely upon these cases, and insist that, under the facts disclosed in evidence, the decree of the circuit court must be sustained. The question to be determined is whether the defendants have made such a showing of facts as will overthrow the legal title; or, in other words, whether the plaintiffs ratified the acts of their father in conveying the land, by receiving and appropriating the consideration therefor, with a full knowledge of the facts attending the transaction. If they did, the transaction touches the conscience, and the plaintiffs ought not to be allowed to hold the land, and the consideration for which it was sold; and, as the cause is here for trial anew upon the evidence, the question must be determined upon the preponderance of the evidence, and in view of the rule that, as the defendants seek to overthrow a plain legal record title, they must, in order to succeed, establish the equity which they assert by clear, satisfactory and conclusive evidence. There is no question made as to the original ownership of the land. It is the sixteenth section in the township in which it is situated, and was therefore school land. The evidence shows that it was purchased from the government by Danford Eddy with the money of May Eddy, his wife, and that Danford Eddy caused the patents to the four quarter-sections to be issued to their four sons, Dearett Eddy, Milton Eddy, Lincoln Eddy and Harvey Eddy. Their patents were duly recorded long before the conveyance in question was made. The records of Hancock county, where the land was situated, showed the title to the land to be in the four sons, and their parents had no more right nor authority to divest them of their title than a

Leathers v. Ross.

stranger would have. There is no pretense that the plaintiffs held the title in trust for any purpose. It was a fee-simple, absolute and indefeasible title. Danford Eddy sold and conveyed the land in September, 1875, and at that time his sons were all minors, aged about eighteen, sixteen, twelve and six years, respectively. The defendants, James Ross and Moses A. Ross, and their brother, Lorenzo Ross, now deceased, owned a farm in Ringgold county, and the evidence shows that in September, 1875, they exchanged their farm with Danford Eddy for certain wild and uncultivated lands, situated in Hancock, Winnebago and Cerro Gordo counties. The land in controversy was conveyed by Danford Eddy and wife to defendants in the exchange thus made. The farm in Ringgold county contained six hundred and forty acres. The defendants conveyed about four hundred acres of the farm to May Eddy, and the remainder, consisting of two hundred and forty acres, appears by the record to have been conveyed to one Robert Clarke for a named consideration of four thousand dollars, and is dated on the twentieth day of September, 1875. On the eleventh day of January, 1876, Robert Clarke and wife conveyed the two hundred and forty acres by warranty deed to the plaintiffs for a named consideration of fifteen hundred dollars.

It is proper to state here that Danford Eddy, Robert Clarke and Lorenzo Ross all died before this action was commenced, and the only witness to the actual transaction between the parties to the exchange of the lands was James Ross. His deposition was taken in behalf of the defendants, and was read on the trial in the court below. A motion to exclude all that part of his deposition relating to personal transactions between himself and Danford Eddy was overruled. The motion is again presented in this court. Under section 3639 of the Code, James Ross could not be examined as a witness as to any personal transactions between him and Robert Clarke or Danford Eddy, unless the plaintiffs waived their right to exclude the testimony. The defendants

2. EVIDENCE:
transactions
between per-
sons deceased

Leathers v. Ross.

contend that they did not make the objection to the testimony at the proper time nor in the proper manner.

8. DEPOSITION:
objecting to
incompetent
evidence:
time.

The original deposition now on file in this court shows that, at the close of the examination in chief of the witness, counsel for appellants asked him if Danford Eddy was living or dead. The witness answered that Eddy died since the year 1878. Thereupon appellants caused the notary public who took the deposition to insert the following: "Plaintiffs move to strike out from the deposition of James Ross herein all that part of his testimony referring to conversations had by him with the said Danford Eddy in relation to the matters in controversy in this action, for the reason that the same is incompetent." And, in the course of the cross-examination of the witness, appellants caused the notary to make the following entry in the deposition: "The plaintiffs ask the following questions, the answers to which are to be read on condition that the court overrules the motion heretofore made by plaintiffs to exclude all the evidence of the witness relating to conversations had with Danford Eddy."

After the deposition was taken and filed, a formal motion was presented to the court, asking that the objectionable testimony be stricken out, on the ground that it was incompetent, irrelevant and immaterial. This motion was presented with the deposition to the court. We cannot conceive that appellants could have been more prompt than they were in making objection to this incompetent testimony. They objected immediately upon the disclosure being made of record that Danford Eddy was dead, and the record shows that by motion they called the attention of the court to their objection some six months before the trial was had. The case of *Watson v. Riskamire*, 45 Iowa, 231, relied upon by counsel for appellees as authorizing the overruling of the objections and motion, has no application to the facts attending the taking of the testimony in question, and we think we must disregard the incompetent testimony in determining the case.

Leathers v. Ross.

The record of these conveyances shows that the defendants did not convey the two hundred and forty acres in Ringgold county to the plaintiffs. The conveyance was made to Robert Clarke, who afterwards conveyed it to the plaintiffs. There is no evidence in the record from which it can, with any plausibility, be claimed that Clarke was a mere medium through which the title passed from the defendants to the plaintiffs. On the other hand, the testimony of May Eddy tends to show that the land was bought with her money from Clarke, and conveyed to the plaintiffs. It is true, her testimony is not explicit on this question. But it was incumbent on the defendants to overcome the presumption arising upon the face of the deeds. Even if we were to consider the testimony of James Ross, that the deed to the two hundred and forty acres was blank as to the grantee when delivered to Danford Eddy, it falls short of overcoming the effect of the deeds, for the reason that there is no sufficient and competent evidence that the passing of the title to Clarke, and his conveyance, was not made upon a substantial consideration between him and the defendants and Eddy; and, besides, there is no evidence that May Eddy, who furnished the money to buy the land in controversy, knew that she signed any deed conveying it away. She testifies that she signed blank deeds, but had no knowledge that there was any intention to convey the land of the plaintiffs, and there is no evidence that the plaintiffs, minors as they were, knew, when the two hundred and forty acres was conveyed to them, that their father had conveyed the land in controversy to any one. The whole transaction impresses one with the idea that Danford Eddy recklessly bartered away the land of others to which he thought he could afterwards acquire the title, and we find nothing in the record which we think entitles the defendants to the land in question. They were within a few miles of the county-seat of Hancock county when they consummated their contract of exchange, and their loss, if any, is fairly attributable to their own negligence in failing to ascertain from the

Leathers v. Ross.

records whether Danford Eddy was the owner of the land which he attempted to convey. The presumption arising from these deeds is that the two hundred and forty acres was not given in exchange for the land in controversy, but that it was sold by the defendants to Clarke for four thousand dollars. We have not thought it necessary to state that Harvey Eddy conveyed his share of the two hundred and forty acres to the plaintiff Leathers before any actions were commenced by the plaintiffs. This will explain the reason why Leathers appears as one of the plaintiffs. His rights, however, are not different from those of Harvey Eddy, if he were still the owner.

II. It appears from the record that the defendants paid the taxes on the land in controversy for several years, as shown by the abstracts of appellants and appellees. The appellees ask that, in case the decree as to the title be reversed, the appellants be required to pay them the amount of said taxes, with six per cent. interest from the time the respective payments were made. As it sufficiently appears that the defendants paid said taxes in good faith, and in the belief that they were the owners of the land, an order will be entered that the same be made a special lien and charge upon the property in favor of the defendants, and the clerk will ascertain the amount from the abstracts on file in this court.

The decree of the circuit court will be reversed, and a decree will be entered here quieting the plaintiffs' title upon the payment of the said taxes with interest.

REVERSED.

Rayburn v. The Central Iowa Ry. Co.

RAYBURN V. THE CENTRAL IOWA RAILWAY COMPANY.

1. **Railroads: INJURY TO SECTION-HAND WHILE BOARDING MOVING CARS: NEGLIGENCE: QUESTION FOR JURY.** Plaintiff and others were section-hands of defendant, engaged in removing snow and ice from the track. While so engaged, a train of cars loaded with slack came along, moving slowly, and the conductor and others in charge of the train directed them to get upon the train to unload the slack. They requested that the train be stopped, but were told that, if stopped, it could not be started again. In attempting to obey the order, plaintiff was thrown down by a jerk of the train and injured. *Held* that the question of negligence on the part of both plaintiff and defendant was one for the jury to determine from the evidence, of the weight of which they were the sole judges.
2. ——— : ——— : ——— : **MATTER OF LAW.** In such case, *held* that if it would, under other circumstances, have been negligence for defendant to attempt to board the moving train, it was not negligence for him to do so when directed by the conductor and others having charge of the train, (Compare cases cited in opinion).
3. ——— : ——— : **ACTION UNDER CODE, SECTION 1307: USE AND OPERATION OF RAILROAD.** In such case, *held* that plaintiff was not precluded from bringing his action against the company under section 1307 of the Code, on the ground that the negligence complained of was in no manner connected with the use and operation of the railroad. (See cases cited in opinion).
4. ——— : ——— : ——— : **CONSTITUTIONALITY.** Section 1307 of the Code, authorizing actions against railroad companies by employees for injuries caused by the negligence of co-employees, is not in conflict with the fourteenth amendment to the constitution of the United States. (*Bucklew v. Central Iowa Ry. Co.*, 64 Iowa, 603, *followed*).
5. ——— : ——— : **EXCESSIVE VERDICT.** A verdict of thirty-five hundred dollars cannot be said by this court to be excessive for an injury to the knee of a section-hand, who is also a mechanic, where the jury may well have found the injury to be permanent.
6. ——— : ——— : **NEGLIGENCE IN CARE OF WOUND.** Whether the continuance of plaintiff's disability was attributable to his subsequent want of care was a question for the jury, with whose finding this court sees no reason to interfere.

74	637
78	125
74	637
79	675
74	637
88	413
88	606
74	637
90	358
74	637
92	540
74	637
93	431
74	637
97	387
97	412
98	551
99	12
101	88
74	637
103	30
74	637
105	590
74	637
122	454

Rayburn v. The Central Iowa Ry. Co.

7. **Appeal : PRACTICE : COMPLAINT OF MISCONDUCT OF COUNSEL BELOW : RECORD.** Where an appellant intends to ask this court to reverse a cause on account of improper language used by counsel in argument to the jury, correct practice requires that the court below shall certify the facts and language complained of, and the question cannot properly be raised in this court upon affidavits of counsel and others.
8. **——— : COSTS OF AMENDED ABSTRACT.** Where appellant assigned sixty-four errors, but insisted on only five or six of them, appellee was warranted in making preparation against the whole sixty-four, and the costs of his amended abstract, reasonably prepared and filed for that purpose, were properly taxed to appellant upon an affirmance of the judgment.
9. **Pleading and Evidence : VARIANCE.** In an action against a railroad company for a personal injury alleged to have been caused by the negligence of the section boss in causing the speed of the train to be increased, the evidence showed that it was the conductor who ordered the increase of speed. *Held* to be an immaterial variance, under Code, section 2686.
10. **Railroads : INJURY TO SECTION-HAND : DAMAGES : ABILITY TO EARN MONEY.** In an action against a railroad company for a permanent injury to a section-hand, it was proper to allow him to show that he was a mechanic, and, as such, capable of earning more money than was paid him by defendant for his services.
11. **Deposition : MOTION TO SUPPRESS : EVIDENCE.** A motion to suppress a deposition was based upon an affidavit of defendant's counsel, showing that a notice of taking the deposition, served on defendant, did not state the place of the residence of the officer to whom the commission was issued. *Held* that this, without more, was insufficient.

Appeal from Mahaska District Court.—HON. J. K. JOHNSON, Judge.

FILED, DECEMBER 19, 1887.

[SUPPLEMENTAL OPINION FILED, JUNE 8, 1888.]

ACTION to recover for personal injuries sustained by plaintiff while attempting to go upon a car attached to a train drawn by an engine on defendant's railroad. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Rayburn v. The Central Iowa Ry. Co.

Anthony C. Daly, for appellant.

Sampson & Brown and *John F. Lacey*, for appellee.

BECK, J.—I. The evidence shows that plaintiff was employed as a section-hand upon defendant's railroad, and, while engaged in removing snow and ice from the track, a train passed upon the road, wherein were a number of cars loaded with slack to be drawn to another place. Plaintiff and the men working with him were directed by the conductor and others upon and in charge of the train to get upon the cars and accompany them. It was the purpose to employ plaintiff and the other section-men in unloading the slack. The train was not stopped, and some of the section-hands requested those in charge of the train to stop it, but were informed that, if stopped, the train could not again be started. Thereupon plaintiff attempted to get upon one of the cars. By reason of a quick movement or "jerk" given to the train, and the snow upon the track, plaintiff was thrown down, and received a severe injury to one of his knees, which he claims is permanent.

II. Counsel for defendant insists that the conductor and others who ordered plaintiff to get upon the train were not negligent, for the reason that the train was moving so slowly that plaintiff could have gone upon the cars in entire safety. He again insists that plaintiff was not bound to get on the train until it stopped, and, if it was negligent in the conductor to order plaintiff to get upon the car, it was negligent in plaintiff to attempt it, and he urges that defendant is not chargeable with negligence, and that plaintiff is chargeable with contributory negligence. The facts of the case do not authorize the conclusion that, as a matter of law, either plaintiff or defendant is guilty of negligence. The question of the care of each was for the jury to determine, not for the court; and it cannot

1. RAILROADS:
injury to
section-hand
while board-
ing moving
cars: negli-
gence: ques-
tion for jury.

Rayburn v. The Central Iowa Ry. Co.

be truthfully said that there was a failure of evidence authorizing the jury to find negligence on the part of defendant and due care on the part of plaintiff. The evidence is discussed at considerable length by defendant's counsel, to support his position to the contrary. It would be profitless to occupy the time required to review the evidence on this point, which could only be done in many pages.

III. If, under other circumstances, it would have been negligence in the plaintiff to attempt to get on the car while it was in motion, it was not negligence for him to do so when required by the order of the conductor and others having charge of the train. *Fransden v. Chicago, R. I. & P. Ry. Co.*, 36 Iowa, 372; *Cooper v. Central Railroad of Iowa*, 44 Iowa, 134; *Pyne v. Chicago, B. & Q. Ry. Co.*, 54 Iowa, 223.

IV. Counsel insists that plaintiff is not authorized to maintain this action for the negligence of his co-employees, under Code, section 1307, for the reason that such negligence was in no manner connected with the use and operation of the railroad. It must be remembered that plaintiff was required to go upon the train for the purpose of aiding in unloading the cars. The employment and duties of plaintiff were identical in character with those of plaintiffs in *Schroeder v. Chicago, R. I. & P. Ry. Co.*, 47 Iowa, 375; *McKnight v. Iowa & M. Ry. Const. Co.*, 43 Iowa, 46; and unlike those of plaintiffs in *Fransden v. Ry. Co.*, *supra*; *Pyne v. Ry. Co.*, *supra*; *Crowley v. Burlington, C. R. & N. Ry. Co.*, 65 Iowa, 658, and *Farley v. Chicago, R. I. & P. Ry. Co.*, 56 Iowa, 337. Following the doctrines of these cases, we hold that the plaintiff may maintain his action for injuries resulting from the negligence of an employe of the defendant engaged in operating the train upon its road.

V. Counsel insists that Code, section 1307, just cited, is in conflict with the fourteenth amendment to

Rayburn v. The Central Iowa Ry. Co.

4. —: —: the constitution of the United States. This
 —: constitu- precise question was determined adversely
 tionality. to counsel's position in *Bucklew v. Cent.*
Iowa Ry. Co., 64 Iowa, 603. We have no ground for
 doubting the correctness of our decision in that case,
 which is brought to our attention in the argument of
 counsel.

VI. It is insisted that the verdict for thirty-five
 hundred dollars is excessive. The jury could well have
 found that plaintiff's injuries are perma-
 5. —: —: excessive ver- nent. We cannot say that the sum he
 dict. recovered is in excess of the amount of dam-
 ages which will compensate him for his injuries.

VII. Counsel insists that the continuance of
 defendant's disability is attributable to his want of care
 after he was injured; but this was a matter
 6. —: —: neg- for the consideration of the jury, and the
 ligence in care of wound record of the evidence discloses no ground
 upon which we can interfere with their findings in this
 regard.

VIII. It is urged that the court below erred in not
 setting aside the verdict on account of the misconduct
 of plaintiff's counsel in presenting, in their
 7. APPEAL: arguments to the jury, inflammatory appeals
 practice: complaint of and considerations, which should not have
 misconduct of counsel been urged, to influence the finding of the
 below: record verdict. The substance and language of that part of
 counsel's argument to which the objection is made are
 set out in affidavits of defendant's counsel at the trial,
 and of others. Counter-affidavits were filed by counsel
 on the other side. This contest of affidavits between
 members of the profession is unseemly, and ought not
 to be tolerated. The law provides for perpetuating of
 record such matters by bills of exceptions by which the
 court below can show the facts, thus avoiding the neces-
 sity of resorting to affidavits. In view of the fact that
 usually a short-hand writer is in attendance upon the
 trial courts, his aid can be secured to take down the

 Rayburn v. The Central Iowa Ry. Co.

improper words of counsel; or the court, when objection is made thereto, can at the time reduce them to writing. In either case, they may be then or afterwards embodied in a bill of exceptions. This practice will involve no inconvenience, and will secure greater accuracy in preserving the objectionable words of counsel than can be attained by resorting to affidavits and counter-affidavits. We conclude that matters of this kind ought not to be made of record, and brought here, except upon bills of exceptions. We have heretofore reviewed objections based upon like conduct of counsel which were shown by affidavits, but no objections were made on the ground that the facts and language brought in question were not preserved and embodied in the records by bills of exceptions. We doubt not that, had the objections been made, we would have refused to review the question of misbehavior of counsel; but, at all events, we are now satisfied that correct practice requires that the court below shall certify the facts and language complained of as amounting to misbehavior on the part of counsel. In support of this conclusion, see *Smith v. Wilson*, 31 N. W. Rep. 176, decided by the supreme court of Minnesota.

IX. It is lastly insisted that plaintiff ought to be taxed with the costs of his additional abstract. We think differently. While defendant urges in argument no more than five or six of its assignments of error, they number sixty-four, and cover every point which ingenuity can suggest as being available for assault upon the judgment of the court below. Counsel of the plaintiff well prepared defenses at these numerous threatened approaches, for they knew not but attacks would be made at all. We think they were warranted in presenting the matter found in these additional abstracts in order to make their preparation complete against the threatening multiplicity of sixty-four assignments of error.

We have considered all questions discussed by counsel, and reach the conclusion that the judgment of the district court ought to be

AFFIRMED.

8. —: costs of
amended
abstract.

OPINION ON REHEARING.

BECK, J.—A petition for rehearing calls our attention to certain matters discussed in the argument of defendant's counsel, which demand further attention.

I. Counsel in the petition insists that plaintiff did not establish his right to recover, for the reason that his amended petition alleges that the section boss caused the engineer to increase the speed of the train while plaintiff was attempting to get upon the car, which caused the injury. The evidence tends to show that the conductor gave the order, by a signal, for the increase of the speed of the train, and the court in an instruction directed the jury that, if they should so find, it is a fact supporting plaintiff's right to recover. Counsel insists that the evidence in this regard failed to support the allegation of the petition, and the instruction referred to is erroneous, in that it recognizes the evidence as supporting the petition. It is only necessary to say that, assuming that the petition as amended does allege that the section boss gave the order to the engineer, which is denied by plaintiff's counsel, the variance between the allegation and proof is not material, as it is not made to appear, nor is it claimed, that defendant was misled to its prejudice. Code, sec. 2686.

II. The plaintiff was permitted to prove that he was a mechanic, and could earn at his trade more than the wages paid him while in the employment of the defendant. To the admission of this evidence defendant objected. The capacity of plaintiff to earn money is a proper matter to be considered in determining the measure of his damages. The fact that he was in the employment of defendant at less wages than he could have earned at his trade did not lessen his capacity to earn money at his trade. It does not appear that, when he entered the employment of defendant, he was in any manner incapacitated to work at his trade, or

9. PLEADING
and evi-
dence: vari-
ance.

10. RAILROADS:
injury to
section-
hand: dama-
ges: ability
to earn
money.

Fowler v. The Town of Strawberry Hill.

that he had permanently abandoned it. The evidence therefore was correctly admitted.

III. It is complained by defendant that the district court erroneously overruled a motion to suppress a deposition on the ground that the notice for taking it does not state the state, county, city or town in which the officer to whom the commission issued resided. The motion to suppress the deposition was based on an affidavit of defendant's counsel, showing that a notice served upon defendant does not show the place of the residence of the officer to whom the commission was issued. This proof, without more, did not authorize the court to suppress the deposition.

The original opinion, with this supplement, considers all questions discussed by counsel. The petition for rehearing is

OVERRULED.

74 644
79 209

74 644
90 358

74 644
106 151

FOWLER V. THE TOWN OF STRAWBERRY HILL.

1. **Appeal: DELAY IN FILING ABSTRACT AND ARGUMENT: MOTION TO AFFIRM.** It is not the practice of this court to affirm causes summarily on motion, after they are prepared for submission on the part of appellants, on the ground of delay in presenting abstracts and arguments. If prejudice has resulted to the other party by such delay, redress must be sought in some other way. (See Code, sec. 8181; Laws of 1874, chap. 56.)
2. **——: MOTION TO STRIKE MATTER FROM AMENDED ABSTRACT.** A motion to strike out a portion of appellee's amended abstract, on the ground that it contains matter not contained in the transcript, is not passed on, for the reason that the original abstract sufficiently shows the fact intended to be shown by the amendment.
3. **Cities and Towns: KEEPING STREETS IN REPAIR: RAILROAD BRIDGES.** An incorporated town is charged by the law with the duty of keeping its streets in proper condition for travel, and this obligation extends to a bridge built in the street by a railroad company, on its right of way, as an approach to a crossing of its track. Whatever obligation may rest upon the company to keep such approach in safe condition, the town still remains liable for negligence in that regard.

Fowler v. The Town of Strawberry Hill.

4. **Practice : RECALLING WITNESS : DISCRETION OF COURT.** In the absence of a showing that the trial court abused its discretion, this court will not interfere with its refusal to allow defendant to recall a witness for cross-examination on the ground that counsel was not informed at the examination in chief of the further fact he wished to elicit.
5. **Appeal: PRACTICE : COMPLAINT OF MISCONDUCT OF COUNSEL: RECORD.** This court will not consider complaints of the misconduct of counsel in the court below where the facts are not shown by proper certificate or bill of exceptions, given by the trial court. Affidavits will not be considered. (*Rayburn v. Central Iowa Ry. Co.*, ante, p. 637, followed.)

Appeal from Jones Circuit Court.

FILED, JUNE 8, 1888.

ACTION to recover for personal injuries sustained by plaintiff by a fall from a bridge upon a street of the town, while riding over it in a sleigh; the accident occurring through the fault of defendant in failing to erect and maintain railings or barriers to the bridge. There was a judgment upon a verdict for plaintiff. Defendant appeals.

Jamison & Mellett, for appellant.

Herrick & Doxsee and *Remley & Ercanbrack*, for appellee.

BECK, J.—I. The plaintiff moves to affirm the judgment of the circuit court on the ground that defendant failed to file the abstract and arguments in the case within the time prescribed by the rules of the court. These papers, and an amended abstract and argument for plaintiff, were duly filed before the last day of the October term, and the cause was submitted thereon with this and another motion, hereafter noticed, at the present term. We are not accustomed to summarily affirm causes after they are prepared for submission on the part of appellants on the ground of delay in presenting abstracts and arguments. If prejudice has resulted

1. **APPEAL:**
delay in filing
abstract and
argument:
motion to
affirm.

Fowler v. The Town of Strawberry Hill.

to the other party by such delay, redress must be sought in some other way. In this we follow the spirit, if not the words, of the statute. See Code, sec. 3181; Laws 1874, chap. 56. The motion is overruled.

II. Plaintiff filed an amended abstract, a part of which defendant moves to strike out on the ground that it contains matter not found in the transcript of the record. We will not pass upon this motion, for the reason that the original abstract sufficiently shows the fact intended to be shown in the amended abstract; viz., that the bridge in question was in a street of defendant.

2. —: motion to strike matter from amended abstract.

III. The following is a brief, though sufficient, statement of facts upon which plaintiff bases her claim to recover in this action: The plaintiff, with her children, and accompanied by her sister as a driver, was passing in a sleigh over one of the streets of the defendant. It was necessary for them to cross a railroad track, which was approached by a bridge, wholly, or nearly so, upon the right of way of the railroad, and was built by the railroad company to be used as an approach to the crossing of its track at the place. The bridge had no railings or barriers, and the horse, becoming frightened, or unmanageable by the driver, fell or jumped from the bridge, taking the sleigh and the occupants with it. The plaintiff sustained injuries to her person from the fall.

IV. The main point made by defendant's counsel is to the effect that the railroad company constructing the bridge is alone liable to plaintiff for any legal claim for damages resulting from its insufficient construction, or negligence in failing to erect sufficient protection by railings or barriers which would have averted the accident. It may be assumed, without so deciding,—for the point is not necessarily in the case,—that the railroad corporation is liable to plaintiff. But this liability does not relieve the town, which we hold is liable in this action. There is nothing in any of the statutes cited by defendant's counsel obligating railroad companies to construct and maintain crossings

THE SAME.

3. Cities and towns: keeping streets in repair: railroad bridges.

Fowler v. The Town of Strawberry Hill.

over their tracks for highways, and approaches thereto, properly regarded as a part of the crossings, which relieves towns and cities of the obligation to cause to be kept in repair such crossings and approaches, either by the railroad companies or otherwise, and which relieves them of liability for defective crossings, through imperfect construction or failure to make repairs when needed. The crossing, being in the street, is a part of it. Under the law, the railroad company is authorized to use the street at the place of crossing for its track. But the street is not vacated by such use. It remains a street, and is subject to use as such, burdened, however, with the use authorized for a railroad track. The town, under the law, is charged with the duty and obligation to keep the street in proper condition for travel, and, so far as it can be done, in view of the additional burden caused by its use for the railroad track, it must protect the public in the use of the street, and must see that the crossing is kept in proper condition. It cannot abdicate its power, nor abrogate its obligation, on the ground that the railroad company fails to do its duty as to the crossing. The town, in the discharge of this duty and this obligation, must see to it that the railroad company keeps the crossing in the condition required by law; and, if it fails to do so with the promptness demanded by the interest and the proper protection of travelers upon the street, the town itself must do the required work, and seek redress against the railroad company. The town exists for the convenience and protection of its inhabitants. It cannot escape liability for its neglect on the ground that what it ought to have done should also have been done by another. A lot-owner may be required, by ordinance or otherwise, to keep the sidewalk abutting his property free of snow and ice, or in proper repair. If he fails in his duty and the discharge of his obligation in this regard, the city is not excusable for its neglect or failure to cause the work required to be done by the lot-owner, or for failure to do the work itself. These views are based upon familiar principles. See, in their support, 2 Dill. Mun. Corp. sec. 1037,

Fowler v. The Town of Strawberry Hill.

p. 1064, and notes. Instructions given by the circuit court, and rulings upon evidence on this branch of the case, are in accord with the doctrines we have stated.

V. Other instructions upon the subject of the care due from the plaintiff or her driver, contributory negligence, and other questions, are correct, harmonizing with familiar rules of the law. The objections based thereon, with one or two exceptions, are not argued; counsel contenting themselves with their simple statement. We cannot be expected to discuss them.

VI. At the trial defendant asked to recall a witness for cross-examination as to statements made by her.

4. PRACTICE: recalling witness: discretion of court. The request was based on the ground that counsel was not informed when she was examined in chief of the fact he wished to elicit on the cross-examination. This application rested largely upon the discretion of the judge, which is not shown to have been abused by the refusal to permit the witness to be called for further cross-examination.

VII. It is now urged, as a ground of reversal, that counsel for plaintiff, in his address to the jury, improperly made statements of facts not shown in the evidence. This objection is based upon an affidavit. But we have recently held that matters of this kind must be shown by the proper certificate or bill of exceptions given by the court. We will not consider affidavits given to establish the fact. *Rayburn v Central Iowa Ry. Co., ante*, p. 637.

VIII. The evidence sufficiently supports the verdict upon all issues of the case. The amount found for plaintiff is not excessive.

The judgment of the circuit court is

AFFIRMED.

The State v. Shank.

74	649
79	53

THE STATE V. SHANK.

1. **Intoxicating Liquors: NUISANCE: PHARMACIST: PRESUMPTION FROM KEEPING LIQUORS.** In the prosecution of a registered pharmacist for keeping a liquor nuisance, the defendant complains of an instruction in which the court stated that the finding of intoxicating liquors in any place where merchandise is kept for sale is presumptive evidence that they are kept there for the purpose of illegal sale. *Held* no error, in view of the fact that, in the same instruction, the court plainly directed that the defendant, as a registered pharmacist, had the right to keep intoxicating liquors in his drug-store for compounding medicines, and therefore the burden rested on the state to show that such liquors were kept by defendant for unlawful purposes.
2. ———: ———: ———: **EVIDENCE: QUANTITY AND KIND OF LIQUORS.** In such case, in determining the purpose for which the defendant kept liquors, the jury may consider the amount and kind thereof.
8. ———: ———: ———: **TIME: INSTRUCTION.** In such case the court instructed:—"If the evidence shows that defendant, during the time covered by this indictment, kept intoxicating liquor in his pharmacy that was in no measure useful in compounding medicine, then the presumption would be that such liquor was kept for an illegal purpose." *Held* erroneous, because the indictment covered a time when, under the statute, intoxicating liquors were lawfully kept by pharmacists for medical purposes, without the restrictions imposed by the law in force when the indictment was found.

Appeal from Montgomery District Court.—HON. A. B. THORNELL, Judge.

FILED, JUNE 9, 1888.

DEFENDANT was indicted and convicted for keeping a nuisance by maintaining a place for the unlawful sale of intoxicating liquors. He now appeals to this court.

C. E. Richards and *S. McPherson*, for appellant.

A. J. Baker, Attorney General, for the State.

The State v. Shank.

BECK, J.—I. The following instruction given by the district court to the jury is made the foundation of objections to the judgment upon the verdict in this case: “7. The keeping of any kind of intoxicating liquor in any saloon or grocery-store, or any place where articles of merchandise are kept for sale, is presumptive evidence that it is kept there for the purpose of illegal sale, unless the presumption is removed by evidence showing that it is kept for some other and different purpose. The evidence, however, shows that, during the period of time covered by this indictment, the defendant was a registered pharmacist; and you are instructed that, as such registered pharmacist, the defendant would have the right to keep intoxicating liquor in the pharmacy for use there for the necessities of compounding medicine only, and the burden is upon the state to show that any intoxicating liquors found in his pharmacy during said time were kept for another and different purpose. Whether defendant kept liquors in the place in question during the time covered in this indictment, and, if so, whether they were kept for an illegal purpose, are questions of fact, to be determined by you from all the evidence in the case. In deciding these questions, you should, so far as can be gathered from the evidence, consider the amount and kinds of intoxicating liquors kept by the defendant in the place in question, if any are shown to have been kept by him, the purpose for which the same were used, and the amount and kinds of intoxicating liquor needed for use by defendant in his pharmacy for the necessities of compounding medicine only. If the evidence shows that the defendant, during the time covered by this indictment, kept intoxicating liquor in his pharmacy that was in no measure useful in compounding medicine, then the presumption would be that such liquor was kept for an illegal purpose.”

II. Counsel urge the following objections to the instruction: The instruction, it is claimed, erroneously

The State v. Shank.

directs the jury that the finding of intoxicating liquors in "any place where merchandise is kept for sale is presumptive evidence that it is kept there for the purpose of illegal sale." This direction of the instruction, it is insisted, holds that the keeping of intoxicating liquors by defendant, who is a pharmacist, and therefore keeps merchandise for sale in his drug-store, is presumptive evidence that he kept the liquors for unlawful sales. But the instruction, read as a whole, plainly, directs the jury that defendant, as a registered pharmacist, had the right to keep intoxicating liquors in his drug-store, for compounding medicines, and therefore the burden rested upon the state to show that such liquors were kept by defendant for unlawful purposes; thus relieving the defendant, in this case, of the presumption which would arise in a case to which the rule stated by the court is applicable. The jury could not have been misled by the instruction, and under it based their verdict upon the presumption. We need not inquire whether the rule of the instruction is correct, so far as it specifies that places where articles of merchandise are kept for sale are within the presumption; for, if it be erroneous, no prejudice could possibly have resulted to defendant, for by the language of the instruction he is excluded from the operation of the rule, so far as it is objectionable.

III. The instruction directs the jury that, in determining the purposes for which defendant kept intoxicating liquors, they may consider the amount and kind thereof. The instruction, as to this part of it, is also complained of by counsel. We think it is correct. Surely, a pharmacist who keeps intoxicating liquors for sale as a beverage, as well as for the legitimate purposes of medicine, will require a greater quantity and a greater variety of liquors to supply his trade than would be demanded did he keep it only for the necessities of medicine.

IV. The last sentence of the instruction, it is insisted by counsel, is erroneous, in that it extends the

2. — : — :
 — : evi-
 dence : quan-
 tity and kind
 of liquors.

The State v. Shank.

8. —: —: rule therein stated to a time .when,
—: time: in- under the statute, intoxicating liquors
struction, were lawfully kept by pharmacists for
medical purposes without the restrictions imposed
by the law in force when the indictment was found.
On account of the amendment or change of the statute
on this subject, intoxicating liquors were lawfully kept
by pharmacists, during the earlier part of the time cov-
ered by the indictment, without a permit; and the
keeping of the same kind of liquors without a permit
was forbidden during the latter part of that period.
Upon this ground, counsel insist that the instruction
is erroneous. The part of the instruction under con-
sideration is justly subject to the objection. The
defendant being authorized to keep intoxicating liquors
for lawful purposes during a part of the time covered
by the indictment, no presumption arises against him
that they were kept for unlawful purposes; but the
law will rather presume, in the absence of proof to the
contrary, that he kept them for lawful purposes, for
men are presumed to act in obedience to the law when
their acts are not shown to be unlawful. There was
evidence tending to show that one or more sales were
made during the time covered by the indictment in
which defendant was authorized to keep and sell
liquors for lawful purposes. The instruction, therefore,
will be presumed to have been prejudicial to defendant.
Objections based upon the rulings of the court upon
questions involving the admissibility of evidence, and
the sufficiency of the evidence to support the verdict,
need not be considered, as these questions may not
arise upon another trial. The judgment of the district
court is

REVERSED.

THE STATE V. DILLON.

1. **Murder: EVIDENCE: STATEMENTS OF DECEDENT.** After the decedent had received his fatal wound, the defendant and another were brought before him, and he then stated that defendant was the man who wounded him. *Held* that evidence of this statement was admissible to show the demeanor of the defendant when accused by the deceased. (Compare *State v. Nash*, 10 Iowa, 82.)
2. **Criminal Law: TRIAL: USING WITNESSES BEFORE GRAND JURY.** There is no obligation resting upon the state to use upon the trial all the witnesses examined before the grand jury, and evidence of a failure so to do is not admissible to show the *animus* of the prosecution. (Compare *State v. Middleham*, 62 Iowa, 153.)
3. **Murder: EVIDENCE: NATURE OF WOUND: DEFENDANT'S KNOWLEDGE.** Evidence that defendant was informed of the nature of decedent's wound shortly after it had been received *held* properly excluded, when offered by defendant.
4. ———: ———: **WOUNDS UPON DEFENDANT.** When defendant claimed that the fatal wound was given in an affray in which he had been knocked down, receiving certain injuries, evidence that no wounds were found upon him when arrested was admissible.
5. ———: **RESULT OF CONTINUED AFFRAY: INSTRUCTION.** An instruction asked, to the effect that, if the fatal wound was given in an affray which was but the culmination of a continued fight, then defendant could not be found guilty of any offense higher than manslaughter, and not of that offense, if he was defending himself, was properly refused, since he may have been the aggressor all through the fight. (Compare *State v. Morphy*, 33 Iowa, 276.)
6. ———: **SELF-DEFENSE AFTER FIRST BEING AGGRESSOR: BURDEN OF PROOF: INSTRUCTION.** An instruction which says, in effect, that if defendant, in the first instance, sought a disturbance or fight with the deceased, but afterwards sought to avoid the difficulty, the burden of proving that he inflicted the wound in self-defense is upon defendant, *held* erroneous. (See opinion for cases followed and distinguished.)
7. ———: **MUTUAL COMBAT: SELF-DEFENSE AFTER WITHDRAWING: INSTRUCTION.** The court instructed that "in case of mutual combat, where both parties are in the wrong, both or either are responsible for the results of their acts, and one cannot claim anything on the ground of self-defense from the assaults of the other, if within the nature of the combat, until he has first withdrawn from the combat, and retreated as far as he can with safety, and clearly evinces to his adversary his intention to do so." *Held* too strict as to the party withdrawing,—it being sufficient if his adversary has reasonable grounds for believing that he has withdrawn, even though the fact is not clearly evinced.

74	653
78	491
74	653
92	549
74	653
104	726
74	653
125	513
74	653
129	214

The State v. Dillon.

8. ——— : INDICTMENT : COUNTS NOT IN ALTERNATIVE. An indictment for murder charged in one count that the offense was committed with a knife, and, in another, that it was committed with a certain sharp instrument to the grand jury unknown. *Held* that, although the counts were not in the alternative, the indictment evidently charged but one offense, and was therefore not bad on that account. (Compare *State v. Watrous*, 13 Iowa, 494.)

Appeal from Clinton District Court.—HON. A. J. LEFFINGWELL, Judge.

FILED, JUNE 9, 1888.

ON the tenth day of May, 1887, one Timothy Mullany received a wound, from the effects of which he died some two days later. Appellant and one Richard Kelly were jointly indicted for the alleged murder of said Mullany. Appellant was tried separately, and convicted of the crime of murder in the second degree. He was sentenced to imprisonment at hard labor in the state penitentiary at Anamosa for the term of twenty-five years, and from that judgment he appeals.

Walter I. Hays, D. J. Darling, J. S. Darling and A. L. Schuyler, for appellant.

A. J. Baker, Attorney General, *A. Howat* and *L. A. Ellis*, for the State.

ROBINSON, J.—I. Two witnesses for the state were permitted to testify that, after Mullany was wounded, the defendant and another person were brought into his presence, and that Mullany then said that defendant was the man who had cut him. Appellant insists that the court erred in admitting this testimony, for the reason that the statement of Mullany was not a dying declaration within the meaning of the law, nor was it a part of the *res gestae*. We assume that the evidence was admitted to show the demeanor and statements of

1. MURDER : evidence : statements of decedent.

The State v. Dillon.

defendant when accused by the deceased, and for that purpose it was admissible. *State v. Nash*, 10 Iowa, 82.

II. Defendant attempted to show, by a number of witnesses who had not been called by the state, that they had testified before the grand jury which returned the indictment upon which the defendant was tried. Evidence offered for that purpose was excluded. It is urged by appellant that it was the duty of the state to place upon the stand all the witnesses examined by the grand jury, and that its failure to do so might be proven to show "the *animus* of the prosecution, if for nothing else." It may be conceded that it was the duty of the state to show the real facts of the case so far as it was able to do so, and that it should not knowingly ask the conviction of an innocent person; but we know of no rule of law which requires the state to produce as witnesses all persons who may have testified before the grand jury. The facts which some of them would testify to may be immaterial, or may have been sufficiently established by other means, or the state may have good reason to question their truthfulness. Hence it follows that the failure of the state to produce all witnesses who testified before the grand jury is not a wrong, and creates no presumption of wrong. *State v. Middleham*, 62 Iowa, 153.

III. Appellant complains of the refusal of the court to allow proof of the fact that he was informed of the nature of the wound inflicted on deceased a short time after it had been received. The record discloses no facts which made such evidence proper, and we think there was no error in excluding it.

IV. Complaint is also made of the ruling of the court in permitting witnesses to testify that they saw no injuries upon the person of defendant at the time and soon after he was arrested. Defendant had claimed that the cutting was

2. CRIMINAL
law : trial :
using wit-
nesses before
grand jury.

3. MURDER :
evidence :
nature of
wound : de-
fendant's
knowledge.

4. — : — :
wounds upon
defendant.

The State v. Dillon.

done during an affray in which he had been knocked down, receiving certain injuries. It was certainly competent to prove that he showed no evidence of having received any injury, so far as observers could see, and we think there was no error in the ruling.

V. The appellant complains of the ruling of the court in refusing to give an instruction in the following language: "The theory of the prosecution upon the evidence is that Mullany was cut by Dillon at or near the corner of Seventh avenue and Second street, without there having been any preceding fight, except right then and there; and its evidence has been offered to support this theory. If you find from the evidence and believe that there had been a preceding fight or quarrel between the parties engaged in the transaction, further east on Seventh avenue, and that what took place at or near the corner was a continuance of it, and that the said evidence upon the part of the state only covers the latter part of said fight, then the evidence for the state will not justify you in finding any verdict of guilty of any offense above manslaughter, and of that only in the event that you find from the evidence that said Dillon was not defending himself, as explained to you in the charge of the court." There was no error in refusing this instruction. If it be conceded that it correctly represents the theory of the state, it does not correctly state the law. Whether or not a murder could have been committed in the affair in which the wound which caused the death of Mullany was inflicted, would depend upon the circumstances under which the wound was received, and the purpose and intent with which it was inflicted. The jury may have found that defendant was the aggressor in all the transactions involved in this case, and that what he did was with a malicious intent. The evidence offered was not of such nature and import as to justify the instruction in any respect. *State v. Morphy*, 33 Iowa, 276.

VI. Much complaint is made of the fifteenth paragraph of the charge to the jury. It is lengthy, and does

The State v. Dillon.

6. — : self-
defense after
first being
aggressor :
burden of
proof : in-
struction.

not in all respects clearly express the legal proposition which it seeks to announce. There is some conflict in its statements. We need not set out the entire paragraph ; but will consider one portion to which appellant objects, and which is as follows : “There is also another qualification, where a defendant in such case can still claim the benefit of the plea of self-defense ; and this is when there has been on his part, after he sought the disturbance, and before the time he sought to exercise the claimed right of self-defense, a change of conduct or action on his part. But in such case the burden of proving such change, if any, is on the defendant, and he must satisfy you, by evidence introduced for that purpose, or by all the evidence in the case, that he did so change, or the plea of self-defense will not avail him except as hereinbefore explained.” This portion of the charge says, in effect, that if defendant, in the first instance, sought a disturbance or fight with the deceased, but afterwards sought to avoid difficulty, the burden of proving that he inflicted the wound in self-defense is upon defendant, and he must satisfy the jury that such was the fact. This was not only erroneous, but in conflict with the second paragraph of the charge, which stated that “the burden of proof is on the state to show the absence of self-defense and the want of sufficient provocation, and the burden of proof at no stage of the case in this class of cases is cast upon the defendant, except where the defense is wholly disconnected from the body of the offense, and is distinct affirmative matter ; as insanity, an *alibi*, or the like.” This court held in *State v. Tweedy*, 5 Iowa, 437, that if the evidence fails to show that the act which caused the death was unjustifiable, or if that question was left in doubt, the jury should not convict, and that the defendant was not under the necessity of establishing matter in justification by a preponderance of the evidence. This was approved in *State v. Porter*, 34 Iowa, 140, when this court said that defendant “is entitled to an acquittal if

The State v. Dillon.

he shows by the facts attending the commission of the offense proved, either by himself or the state, that there is reasonable doubt that his act was wilful." See, also, *State v. Fowler*, 52 Iowa, 106; *State v. Cross*, 68 Iowa, 196. It is claimed that a contrary rule is sanctioned in *State v. Neeley*, 20 Iowa, 114; but an examination of that case will show that the question we have been discussing was not there considered. The case of *State v. Cross*, *supra*, does not sustain the portion of the charge which we have criticised, nor does the case of *State v. Peterson*, 67 Iowa, 566, also cited for appellee. Where insanity and some other defenses are relied upon, a different rule prevails. *State v. Hockett*, 70 Iowa, 452. The decisions of this court, so far as we are aware, have uniformly sustained the conclusions we reach in this case, that the portions of the fifteenth paragraph quoted are erroneous. But it is said that, if erroneous, no prejudice resulted, for the reason that there was no evidence of any change in the purpose of defendant with respect to decedent prior to the infliction of the death wound. There was evidence on the part of the defendant which tended to show that there was a difficulty between decedent and his companion, Coffey, on the one hand, and defendant and Kelly, on the other; and that the two last named retreated from the others before the final struggle, when deceased was wounded. What, if any, importance should have been attached to that evidence was within the province of the jury to determine.

VII. The sixteenth paragraph of the charge instructed the jury that, "in case of mutual combat, where both parties are in the wrong, both or either are responsible for the results of their acts, and one cannot claim anything on the ground of self-defense from the assaults of the other, if within the nature of the combat, until he has first withdrawn from the combat, and retreated as far as he can with safety, and clearly evinces to his adversary his intention so to do." It is objected by appellant that the rule here announced as to the one who withdraws from the combat is too strict, and we think

7. — : mutual combat : self-defense after withdrawing : instruction.

Sullens v. The Chicago, R. I. & P. Ry. Co.

this is true. If he actually and in good faith withdraws from the combat, he ceases to be a wrong-doer; and, if his adversary have reasonable ground for holding that he has so withdrawn, it is sufficient, even though the fact is not clearly evinced.

VIII. The indictment charges defendant and Kelly with the crime of murder in the first degree. In one count it is charged that the offense was committed with a certain knife, and in another that it was committed with a certain sharp instrument, to the grand jury unknown.

8. —: indictment: counts not in alternative.

In other respects the counts are substantially the same. It is claimed by appellant that the indictment is bad, for the reason that the counts are not in the alternative. It is clear, from the language used, that but one offense is charged, and the indictment is therefore sufficiently specific. *State v. Watrous*, 13 Iowa, 494.

IX. Numerous other questions are presented for our consideration; but, as none of them are likely to arise on another trial, we have no occasion to determine them. For the errors specified, the judgment of the district court is

REVERSED.

SULLENS v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

1. **Railroads: OBSTRUCTING SURFACE WATER BY EMBANKMENT: LIABILITY.** Where the defendant built an embankment across a wide creek bottom, and a culvert over the creek, thus causing all the surface water of the bottom to flow into the channel of the creek, but the culvert was not of sufficient capacity to carry the waters of the creek when thus augmented, and the result was that the land above the embankment was flooded, the land-owner may recover damages of the company. (See opinion for discussion of authorities *pro* and *con*.)
2. —: —: WHAT IS SURFACE WATER. In such case, water which left the creek channel far above the culvert, and flowed over plaintiff's land, but, on account of the embankment, was turned back into the channel again above the culvert, must be regarded, in determining the sufficiency of the culvert, as no longer surface water, but as though it had flowed all the time in the channel.

74	650
78	135
74	650
86	28
74	650
88	285
74	650
106	402
74	650
107	65
74	650
110	574
74	650
117	541
117	542
74	650
126	94
74	650
127	533
74	650
129	477
p129	480
f129	481
74	650
133	645
74	650
142	156

Sullens v. The Chicago, R. I. & P. Ry. Co.

3. **Evidence : ERROR IN ADMITTING : CURED BY INSTRUCTION.** Error in the admission of evidence is cured by an instruction which in effect withdraws the objectionable evidence from the consideration of the jury.
4. **Railroads : OBSTRUCTING WATER : DAMAGES.** In an action for damages caused by the obstruction of water by a railroad embankment, the court stated that the measure of plaintiff's damages for each year was the difference between the fair market value of the land immediately before the injury each year, and its fair market value immediately after such injury ; also that the term "land," so used, included the growing crops. *Held* to be in accord with the rule announced in *Drake v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa, 802, and correct.
5. ——— : ——— : **STATUTE OF LIMITATIONS.** In such case, where the damage was likely to be of yearly occurrence, depending upon the seasons, and, on that account, could not be estimated when the obstruction was built, *held* that the plea of the statute of limitations, based on the fact that the action was not begun within five years after the obstruction was built, was properly taken from the jury. (See opinion for cases cited.)
6. **Verdict : AVERAGE : AFTERWARDS AGREED TO.** Where each juror states the amount which he thinks plaintiff ought to recover, and the sum of these amounts is divided by the number of jurors and the result is afterwards agreed to as the amount of the verdict, *held* that it is valid. (See *Hamilton v. Des Moines Valley Ry. Co.*, 86 Iowa, 85.)

[SEEVERS, C. J., dissenting.]

Appeal from Jasper District Court.—HON. J. K. JOHNSON, Judge.

FILED, JUNE 9, 1888.

ACTION to recover damages alleged to have been caused by the improper obstruction of a stream which flows through the land of plaintiff and across the right of way of defendant. The cause was tried to a jury, and verdict and judgment rendered for plaintiff. The defendant appeals.

T. S. Wright and Winslow & Varnum, for appellant.

Phillips & Day and Kerr & McElroy, for appellee.

ROBINSON, J.—The defendant owns and operates a railway which crosses a stream of water in Jasper county, known as “Rock Creek.” At the point of crossing, the stream is from twenty-five to thirty feet in width, and is bordered on the east by a strip of land lower than the level of the railway track, and on the west by low ground, which extends back from the creek a distance of from a quarter to half a mile. The land and stream form a valley bounded on the west by highlands. Prior to 1875, defendant’s railway crossed the creek and lowlands by means of a wooden bridge and trestle-work. During that year a stone culvert was constructed over the stream, and embankments of earth were commenced and completed a year or two later, which extended across the lowlands and culvert to a height of about forty feet above the general level of the lowlands. The culvert was about eighty feet in length, thirty in width, and twenty-two in height, and constituted the only opening in the embankment for the passage of the waters from above it. The plaintiff owns the land which is bounded on the south by the right of way of defendant on which the embankment in question is built. Rock Creek flows, for a considerable distance, through the lands of plaintiff before it reaches the culvert in question. In June, 1882, a portion of the culvert fell in consequence of high water. It was never rebuilt; but, to carry its railway across the stream, defendant removed a portion of the earth from the culvert, and constructed over it a wooden bridge. It is contended by plaintiff that, when the culvert was constructed, the bed of the stream under it was raised several feet by means of stone-work; that a portion of it fell in consequence of the fault of plaintiff, precipitating into the stream below, in such manner as to further obstruct the flow of water, large quantities of stone and earth; that defendant had wrongfully permitted said obstacles to remain in the stream; that the embankment caused all the water which fell upon the land adjacent to said stream to flow through said culvert; that

Sullens v. The Chicago, R. I. & P. Ry. Co.

its capacity, when constructed, was not sufficient to discharge such water; and that its original capacity has been diminished, and the flow of water hindered, by the obstacles aforesaid; that, in consequence of these faults, the lands of plaintiff were overflowed at different times during four years, commencing with 1882, and great damage caused thereby. It is insisted by defendant that, in constructing the embankment and culvert in question, it was only required to make provision for the flowing across its right of way of so much water as could be contained within the banks of the stream, and that it is not responsible for damages which were caused by water which overflowed such banks.

I. The question involved is one upon which there is much conflict of authorities. Many of them seem to sustain the position of appellant. The case

1. RAILROADS:
obstructing
surface water
by embank-
ment: lia-
bility.

of *Abbott v. Kansas City, St. J. & C. B. Ry. Co.*, 83 Mo. 271, is in many respects similar to this case, and is relied upon by appellant. That case adheres to the common-law rule, and seems to depend in part upon the fact that, by the statutes of Missouri, the common law is made the rule of action and decision in that state. In this state there is no requirement of that kind, and we are free to determine the questions involved according to such rules of law as shall seem to us to be applicable. The difficulty which must sometimes arise from attempts to apply the strict rule of the common law to all cases is illustrated by the fact that the supreme court of Missouri was constrained to abandon it in two cases, which were overruled in the one above cited. Each case must of necessity depend largely upon its own facts. Even in those states where the common law prevails, the courts hold that the landowner must improve his property in a reasonable manner. *Hosher v. Kansas City, St. J. & C. B. Ry. Co.*, 60 Mo. 329; *Abbott v. Ry. Co.*, *supra*; *Pettigrew v. Evansville*, 25 Wis. 229. "But persons exercising this right to improve and ameliorate the condition of their own land must exercise it in a careful and prudent

Sullens v. The Chicago, R. I. & P. Ry. Co.

way. * * * Each proprietor, in such case, is left to protect his own lands, against the common enemy of all, * * * so as to occasion no unnecessary inconvenience or damage to plaintiff." *McCormick v. Kansas City, St. J. & C. B. Ry. Co.*, 57 Mo. 433. See, also, *Benson v. Chicago & Alton Ry. Co.*, 78 Mo. 504. This court said in *Livingston v. McDonald*, 21 Iowa, 172, that "the rules of the civil law, * * * so far as they deny to the upper owner the right to collect the water in a body, or precipitate it in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter, we deem to be just and equitable; * * * and to this extent it is supported by the weight of authority in the common-law courts." It also said: "We recognize the general rule that each may do with his own as he pleases, but we also recognize the qualification that each should so use his own as not to injure his neighbor." *Id.* 173. The same principle, as applied to the obstructing of a flow of surface water from the dominant to the servient estate, was recognized in *Drake v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa, 302. The rule thus far adhered to by this court seems to be just, and we do not think there is sufficient cause to abandon it. The reasons for requiring that improvements on land be so made as to do no unnecessary injury to other lands apply with especial force to the construction of railways. These have become so necessary to modern civilization that their builders require and are given extraordinary privileges. One of the most important of these is the right to take and hold so much real estate as may be necessary for the location, construction and convenient use of their railways. The primary object for which railways are built is not to improve the particular tracts of land over which they pass. They are located, in part, with reference to the configuration of the country through which they pass, and the cost of construction. On the other hand, the general land-owner has no voice in the location and construction of a railway. The burden which it may cast upon his land is not such as springs from

Sullens v. The Chicago, R. I. & P. Ry. Co.

those improvements which are designed to make the soil productive. Hence it is not a burden to which his estate is naturally servient. If his land be taken by the railway corporation, he is entitled to compensation for such injury as naturally results from the taking; but his land may not be taken, or, if taken, the railway may be so constructed over it as to cause damage which was not a necessary result of the taking. In such cases, if injury result from an improper construction of the railway, or from wrong in its operation, we see no reason why the railway corporation may not be made to respond in damages. In this case, defendant raised its embankment across the valley of Rock Creek in such a manner as to turn all the water which flowed from above into the main stream. It was not practicable for plaintiff to counteract the effect of this by means of banks or ditches. Whatever its primary object may have been, the fact is that defendant assumed control of the surface waters of the valley, changed their course, and compelled them to flow through an outlet of its own construction. Under these circumstances, we think it was the duty of defendant to construct and maintain its culvert so that its capacity should be sufficient to properly pass the waters of such floods as might reasonably be expected to occur. It would be most unreasonable to limit the obligation of defendant to the providing of such a culvert as would carry off the water which could be contained within the banks of the stream. It is contended by appellant that the case of *Morris v. City of Council Bluffs*, 67 Iowa, 343, is an authority against the conclusion which we have reached. That case involved the right of a city to establish the grade of its streets, and its duty to provide permanent means for the escape of overflow water. It was in effect held that it was not the duty of the city to do more than provide temporary means for the escape of surface water in such cases, and that it was the duty of the lot-owner to bring his lot up to grade, and thereby escape the overflow of which he complained. We do not think that the doctrine of that case is applicable to this. We are of the opinion that the jury were properly

Sullens v. The Chicago, R. I. & P. Ry. Co.

instructed in regard to the duties and liabilities of defendant.

II. Appellant complains of the giving of an instruction in the following language: "You are instructed

2. —:—: that if Rock Creek was a flowing stream the year round, with well-defined banks, and that defendant constructed over said stream

a culvert for the purpose of enabling its railway to pass over said water-course, and if you further find from the evidence that in times of high water, at a point five hundred feet above said culvert, more or less, any portion of the water flowing in said creek in times of high water left its banks at such point above said culvert, and then, for a short distance, flowed over the land of plaintiff, but that the same was forced, by the embankment of defendant, back into the creek again, above said culvert, then such waters are not surface waters, but must be regarded by you, in the determination of this case, in determining the sufficiency of said culvert, in the same light as if they had continuously flowed in said creek."

The theory of the instruction appears to be that, when the overflowed water is turned back into the stream, it ceases to be surface water. This seems to us to be correct. *Jones v. Hannovan*, 55 Mo. 462. But, if the instruction will bear a different construction, no prejudice could have resulted from it under the facts of the case.

III. Complaint is made of the ruling of the court in admitting evidence as to the depreciation of the rental

value of the premises in controversy on account of the alleged wrong of defendant.

3. EVIDENCE:
error in
admitting:
cured by
instruction.

It may be conceded that there was error in admitting this evidence. But the court so

charged the jury as to the measure of plaintiff's recovery as to necessarily withdraw from their consideration the evidence of which complaint is made. The error should therefore be deemed to be without prejudice.

Ham v. Wisconsin, I. & N. Ry. Co., 61 Iowa, 719; *Lathrop v. Central Iowa Ry. Co.*, 69 Iowa, 109.

IV. It is also insisted that the jury were improperly

Sullens v. The Chicago, R. I. & P. Ry. Co.

instructed in regard to the measure of recovery. They were told that the measure of plaintiff's damages for each year was the difference between the fair market value of the land immediately before the injury each year, and its fair market value immediately after such injury; also that the term "land," so used, included the growing crops. This instruction accords with the rule announced in *Drake v. Ry. Co., supra*, and is, we think, correct. The injury was not necessarily permanent because it was to real estate; hence there was no error in permitting the jury to estimate damages for each year of the overflow.

V. This action was commenced in February, 1886. The defendant pleaded the statute of limitations as a defense, and insists that plaintiff's right of action accrued in 1875, when the culvert was completed. The damages which might result from the character of the culvert could not have been foreseen and estimated at that time with any degree of accuracy, but depended, in part, upon the seasons. The jury found specially that the first flood after the culvert was built occurred in 1881. We therefore conclude that the plea of the statute was properly withheld from the jury. *Drake v. Ry. Co., supra*; *Van Orsdol v. Burlington, C. R. & N. Ry. Co.*, 56 Iowa, 470.

VI. Misconduct on the part of the jury in arriving at their verdict is alleged. Each juror gave the sum he thought should be allowed for each separate year, and the amount of those sums was divided by twelve, and the quotient inserted in the verdict as the amount plaintiff was entitled to recover; but there was no agreement in advance to be bound by the result. After it was ascertained it was agreed to by the jurors. *Hamilton v. Des Moines Valley Ry. Co.*, 36 Iowa, 35.

We have examined the record with care, but fail to discover any error prejudicial to defendant. The judgment of the district court is therefore **AFFIRMED.**

SEEVERS, C. J., dissents.

Helt v. Smith.

HELT V. SMITH.

74	667
100	710

1. **Statute of Frauds : PROMISE TO PAY ANOTHER'S DEBT : CONSIDERATION.** Plaintiff had attached certain property of H. Afterwards H. was offering other property, on a part of which defendant had a mortgage, for sale at auction, and defendant was to have enough of the proceeds of the sale to satisfy his mortgage. At this time plaintiff was about to attach more of the property, and the sale was about to stop. Defendant thereupon orally agreed with plaintiff that if he would desist from attaching more property, and thus allow the sale to proceed, he would pay so much of plaintiff's claim against H. as should not be paid by the sale of property already attached. *Held* that the promise was based upon a sufficient consideration to take it out of the statute of frauds. (See opinion for cases followed and distinguished.)
2. **Appeal : PRESUMPTION IN FAVOR OF VERDICT.** Where the trial court instructed the jury that they must find certain facts in order to find for the defendant, and there was evidence from which the jury might well have found such facts, and there was a general verdict for defendant, this court will presume that the jury found such facts, rather than that they disregarded the instructions of the court.
3. **Instructions : REFERRING TO PLEADINGS.** Error in referring the jury to the pleadings in stating the issues is without prejudice, and no ground for reversal, where the jury is in other instructions fully and explicitly directed as to the facts necessary to be proved in order to a recovery.

Appeal from Des Moines District Court. — HON.
CHARLES H. PHELPS, Judge.

FILED, SEPTEMBER 4, 1888.

ACTION on an alleged parol promise by defendant to pay a debt which one H. A. Hills was owing to plaintiff. Verdict and judgment for plaintiff. Defendant appeals.

T. J. Trulock, for appellant.

T. B. Snyder, for appellee.

REED, J.—I. A question in the case is whether the alleged promise by defendant is within the statute of frauds. The evidence shows that plaintiff had instituted a suit on a written demand against Hills, and had sued out a writ of attachment, which had been levied on certain personal property. Hills was offering his property for sale at public auction, and plaintiff, deeming the property seized in the writ insufficient to secure his debt, went to Hills' place on the day of the sale, accompanied by the sheriff, who had the writ, with the intention of levying on additional property. Defendant held a chattel mortgage on a portion of the property which was being sold, and he was present at the sale. By an arrangement between him and Hills, he was to receive a sufficient amount of the proceeds of the property to satisfy the mortgage debt. When it became known that the purpose of plaintiff was to levy on additional property, the sale was stopped. There was evidence which tended to prove that defendant agreed with plaintiff that if the latter would direct the sheriff to make no additional levy, but permit the sale to proceed, he (defendant) would pay such portion of the debt as should be unsatisfied after the sale of the attached property. There was a conflict in the evidence as to whether such agreement was entered into, but the verdict implies a finding by the jury against defendant on the question. Plaintiff and the sheriff left the place without making any additional levy, and the sale proceeded, and all of the property was sold. Plaintiff afterwards prosecuted his suit against Hills to judgment, and sold the attached property; and this action is for the recovery of the unsatisfied portion of the debt. It is very clear, we think, that defendant's promise is not a mere collateral undertaking to answer for the debt or default of another, but is an original agreement, supported by a consideration moving to himself, to pay the debt. He was directly interested in having the sale of the property proceed, for thereby

1. STATUTE of
frauds :
promise to
pay another's
debt : con-
sideration.

Helt v. Smith.

he would secure the payment of the debt due him, without incurring the expense and trouble incident to the foreclosure of his mortgage. For the purpose of securing that advantage, he promised to pay so much of plaintiff's debt as should remain unsatisfied after the sale of the attached property, and by that promise induced plaintiff to forbear making any further seizure upon the writ. The case is very different in its facts from *Westheimer v. Peacock*, 2 Iowa, 528. In that case the promise was supported by no other consideration than the forbearance of the creditor to prosecute his action against the debtor. The promisor derived no benefit or advantage from it. But here the advantage arising from the arrangement moved directly to defendant; and the uniform holding of the authorities is that a promise supported by a consideration of that character is not within the statute. *Blair Town Lot & Land Co. v. Walker*, 39 Iowa, 406; *Johnson v. Knapp*, 36 Iowa, 616; *Chamberlin v. Ingalls*, 38 Iowa, 300.

II. The district court instructed the jury, in effect, that plaintiff could not recover unless he had proven that Hills had property liable to attachment which he (plaintiff) was about to attach; and that defendant, having an interest in the property, and desiring to protect such interest, agreed with plaintiff that, if he would desist from making any further levy upon said property, he would pay any balance that would remain due upon the debt to plaintiff, after crediting the proceeds of the attached property, and that he accepted and relied upon that promise, and abandoned all further efforts to attach the property. Counsel for plaintiff took no exception to this instruction, but contend in argument that the jury must have disregarded it in making up their verdict. His contention was that the evidence did not show that any portion of the property was liable to seizure upon attachment. It may be conceded that the portion of the property which was included in defendant's mortgage was not subject to seizure. It is also probably true that some portion of the property was exempt from sale on

2. APPEAL : pre-
sumption in
favor of ver-
dict.

 Stoddard v. Rowe.

judicial process. But the jury may well have found from the evidence that Hills had property which he was offering at the sale which was neither included in defendant's mortgage nor exempt from execution. The verdict implies that they did so find, and we cannot disturb the verdict.

III. Exception was taken to an instruction in which the jury were told that the question for them to determine was whether, under the circumstances and upon the consideration stated in the petition, defendant entered into the alleged agreement. If it should be conceded that this instruction lacks explicitness, and is open to the objection that it refers the jury to the petition for a statement of the consideration of the alleged contract, we could not reverse on that ground; for it seems to us impossible that any prejudice could have resulted from it, for in other instructions the jury were fully and explicitly directed as to the facts which plaintiff must have proven before he could be entitled to recover.

8. INSTRUCTIONS:
referring to
pleadings.

AFFIRMED.

STODDARD V. ROWE *et al.*

Fraudulent Conveyance: PARENT TO CHILDREN. A parent, who was a judgment debtor, bargained for, and with money in her possession paid for, certain land, which she directed to be deeded to her children. *Held* that this alone, with no evidence as to the ownership of the money paid for the land, was not sufficient to overcome the presumption in favor of the legal title in the children, nor to justify a judgment subjecting the property to the payment of the judgment.

Appeal from Des Moines District Court.—HON. CHAS. H. PHELPS, Judge.

FILED, SEPTEMBER 4, 1888.

THIS is an action in equity to subject certain real estate to the payment of a judgment. The district court rendered judgment in favor of defendants for costs, and plaintiff appeals.

Stoddard v. Rowe.

T. J. Trulock, for appellant.

No appearance for appellees.

ROBINSON, J.—The plaintiff alleges in his petition that on the third day of January, 1882, he obtained a judgment in the district court of Des Moines county against defendants E. G. Rowe and Cynthia J. Rowe, for \$284.35, and that no part of this judgment has been paid; that since said date said judgment debtors have been insolvent; that in February, 1883, for the purpose of defrauding plaintiff, they caused certain real estate, which is described, to be conveyed to their co-defendants Fannie, Hattie, Harry, Mason and Roy Rowe, and to Andrew Rowe; that said grantees are the children of said debtors, and that the money of the latter paid for the conveyance, and that said grantees paid nothing for said land and have no interest therein. Plaintiff asks that his judgment be established as a specific lien on the land. The answer of the judgment debtors is a disclaimer of interest in this suit, and the premises in controversy. Defendants Henry, Mason and Roy Rowe appear to be minors, and, by their guardian *ad litem*, deny all allegations of the petition adverse to their interests. Fannie and Hattie admit that they claim an interest in the land in suit; that the deed therefor runs in their name, and in the names of other co-defendants; and that judgment was recovered by plaintiff as alleged. But they deny all knowledge as to whether the judgment has been paid or not, and deny all allegations not admitted.

The record submitted to us does not show that Andrew was made a party to the suit. There is but little evidence offered by plaintiff, and none by defendants. There is no evidence as to the rendition of the judgment, hence it is not established as against Henry, Mason and Roy. The evidence as to the alleged insolvency of the judgment debtors is neither clear nor satisfactory. The only evidence relating to the ownership of the land in question is a deed from Henry H. Wilson

Stoddard v. Rowe.

and wife to Hattie I. Martin, Mary T. Rowe, William A. Rowe, Henry V. Rowe, Carl W. Rowe and Roy V. Rowe; and the testimony of Wilson, which is as follows: "I reside in Denmark, Lee county, Iowa. I am acquainted with Mrs. E. G. Rowe. I executed a deed to her for the property described in the petition. I made the contract with her, and she paid me the money—five hundred and fifty dollars. She requested me to make the deed to her children, and I asked no questions, but made it that way, and she paid me the money for it. It was in the month of February, 1883. She did not live in Denmark, and does not now. She handed me the money when we came to make the deed. She told me to make it to the children." It will be observed that Mrs. Rowe made no statement as to her object in making the purchase, nor as to the ownership of the money paid. It is not shown that she ever had any property in her own right. If we concede the insolvency of the debtors, as alleged, does the fact that Mrs. Rowe, while owing the plaintiff, negotiated for the land and paid the consideration therefor, overcome the presumptions of title and good faith which are authorized by law? We think not. There is nothing in the transaction, so far as shown, which is inconsistent with good faith and fair dealing. But it is said that the fact that Mrs. Rowe had actual possession of the money is evidence that she owned it. It is true that proof of possession of personal property is presumptive proof of ownership in some cases, but its value depends upon the circumstances of the case. In this case, if there were proof that the grantees of Wilson were wholly without property, or that Mrs. Rowe had had property in her own right which she had converted into money, or that she had been possessed of money in her own right for which she could not account, or that she had shown a desire to hinder, delay or defraud her creditors, we should be disposed to attach more importance to the fact that she paid the money in question. But it seems to us that the presumption arising from the possession of the money by Mrs. Rowe is not sufficient to justify us

Lang v. The Hawkeye Ins. Co.

in holding that the transaction was fraudulent, and that the title of defendants should be subjected to the judgment of plaintiff. In our opinion the evidence fails to sustain the claim of plaintiff, and the judgment of the district court is, therefore,

AFFIRMED.

LANG V. THE HAWKEYE INSURANCE COMPANY.

1. **Fire Insurance: WARRANTY AGAINST INCUMBRANCE: BREACH: JUDGMENTS PAID BUT NOT SATISFIED.** The insured in her application warranted that the insured property was not incumbered. There were four judgments against the property which were not satisfied of record, but it was shown that the sheriff had collected and paid over to the judgment creditors the amounts of two of them, and that the judgment debtor in the other two had the receipts of the judgment plaintiffs acknowledging satisfaction of their judgments. *Held* that no breach of the warranty was shown.
2. ———: **WARRANTY OF OWNERSHIP: BREACH: PENDING ACTION TO ESTABLISH A LIEN.** A warranty of sole and undisputed ownership, in an application for insurance, was not broken by the fact that an action was pending to subject the property to the payment of a judgment, obtained against a former owner after he had conveyed it, on the ground that he had conveyed it for the purpose of hindering and defrauding his creditors; since such action did not question the ownership, but only sought to establish a lien.

Appeal from Keokuk Superior Court.

FILED, SEPTEMBER 4, 1888.

ACTION on a policy of insurance against loss or damage by fire. Trial to the court without the intervention of a jury, and judgment for plaintiff. Defendant appeals.

George R. Sanderson, for appellant.

Craig, McCrary & Craig, Sebert M. Casey and Van Valkenbery & Hamilton, for appellee.

REED, J.—Plaintiff expressly warranted the truth of the statements contained in her application for insurance. One of the statements contained in the application is that the property was not incumbered; another is that plaintiff was the undisputed owner of the property. Defendant pleaded that there was a breach of the first warranty, in that certain judgments against George Armknecht, a former owner of the property, remained unsatisfied when the application was signed, and were liens upon the property; and that there was a breach of the other warranty, in that an action by a judgment creditor of said George Armknecht was pending when the application was signed to subject the property to the satisfaction of his judgment, on the ground that the conveyance of the property by Armknecht to an intermediate grantee, and by that grantee to plaintiff, was for the purpose of hindering and delaying the plaintiff in the action in the collection of his debt.

I. On the trial, defendant introduced in evidence the records of four judgments in the district court of

1. FIRE INSUR-
ANCE: WAR-
RANTY AGAINST
INCUMBRANCE:
BREACH: JUDG-
MENTS PAID
BUT NOT SAT-
ISFIED.

Lee county against George Armknecht, which were rendered while he owned the property. It did not appear by the records that the judgments had ever been satisfied.

It was proven, however, that execution had issued on two of the judgments before plaintiff made the application for the insurance, and that the sheriff had collected and paid over to the plaintiffs the amount of the judgments. It was also proven that Armknecht held the receipts of the plaintiffs in the other cases, acknowledging satisfaction of their judgments. These receipts also bore date earlier than plaintiff's application for the insurance. It has not been seriously contended in this court that the principal of the judgments had not been satisfied. But it was contended that the evidence did not show the payment of the costs in the several cases. But we think that the reasonable presumption from the facts proven is that the costs were paid. The uniform custom is for the sheriff,

when he has collected money on execution, to apply a sufficient amount thereof for the satisfaction of the costs before paying anything over to the execution plaintiff. And when a judgment creditor acknowledges full satisfaction of his judgment, the presumption, inasmuch as the judgment for costs is in his favor, is that he has received the amount of the costs. We think it clear, therefore, that the first breach of warranty alleged by defendant is not established by the evidence in the case.

II. The action in equity to subject the property to the satisfaction of the judgment against Armknecht had

been pending for more than a year when plaintiff made application for the insurance.

2. —: warranty of ownership: breach: pending action to establish a lien.

It was alleged in the petition that Armknecht owned the property when he contracted the debt evidenced by the judgment which the plaintiff in the action had recovered against him; that before the judgment was rendered he conveyed the property to his wife, who subsequently conveyed it to plaintiff; and that each of said conveyances was without consideration, and was executed for the fraudulent purpose of hindering and delaying the creditors of Armknecht in the collection of their debts. The relief demanded was that the property be subjected to the satisfaction of the plaintiff's judgment against Armknecht.

The important question in the case is whether there was a breach of plaintiff's warranty, that she was "the sole and undisputed owner of the property," by reason of the pendency of that action. We are of the opinion that this question should be answered in the negative. This conclusion follows necessarily, we think, from a consideration of the character of the proceeding and the relief demanded. It was not averred in the petition that Armknecht retained any interest in the property, nor was relief sought upon the ground that plaintiff had not acquired the full ownership of it; but the claim was that, owing to the motives and intentions of the parties in executing and accepting the conveyances, the property in her hands should be subjected to judicial sale

 Feshe v. The Council Bluffs Ins. Co.

for the payment of the debt. The plaintiffs in the action did not claim that they had any interest in or a lien on the property. Their judgment was not a lien upon it, for by their own showing the debtor had parted with all interest before the judgment was rendered. If they had prosecuted their action to a successful issue, they would have acquired a lien, it is true, but such lien would have existed, not by virtue of the judgment against Armknecht, but would have been created by the decree against plaintiff. *Howland v. Knox*, 59 Iowa, 46. The warranty relied on is not against incumbrances existing or asserted, but is a warranty of undisputed ownership, and was not broken by the pendency of the action, which, as we have seen, did not dispute plaintiff's ownership, but sought only the establishment of a lien.

There was evidence introduced on the trial which tended to prove that the plaintiffs in the equity action had abandoned their suit, although it had not in fact been discontinued; but, as the judgment is supported by the view we have considered, we deem it unnecessary to go into the question as to its sufficiency.

AFFIRMED.

74	676
78	149
74	676
90	714
74	676
106	508

**FESHE *et al.* v. THE COUNCIL BLUFFS INSURANCE
COMPANY.**

Fire Insurance: DWELLING-HOUSE: BREACH OF CONDITION AS TO OCCUPANCY. The insured property was a dwelling-house occupied by a tenant. The policy provided that it would be void if the property became "wholly or partially vacant or unoccupied, or occupied for purposes not indicated in the written part of the policy." The tenant moved out September 26, and the property was burned on the night of October 1 following. The owner, who lived a mile and a half distant, spent a part of each intervening day in examining and cleaning the house, but did not stay there at night; and her father, who worked near, left an axe and grub-hoe in the house at night. Otherwise the house was unoccupied. *Held* that there was a breach of the conditions of the policy, and that no recovery could be had thereon. (See opinion for cases followed and distinguished.)

Feshe v. The Council Bluffs Ins. Co.

Appeal from Des Moines District Court.—HON. CHAS. H. PHELPS, Judge.

FILED, SEPTEMBER 4, 1888.

ACTION on a policy of insurance against loss or damage by fire. Trial by jury, verdict and judgment for plaintiff, and defendant appeals.

R. W. Barger, for appellant.

S. L. Glasgow, for appellee.

SEEVERS, C. J.—The property insured is described in the policy as follows: "One and one-half story frame shingle-roof dwelling." The policy contains the following provision: "'This policy shall become void if any building hereby insured, or containing the property insured, be or become wholly or partially vacant or unoccupied, or occupied for purposes not indicated in the written part of the policy.'" At the time the policy was executed, the dwelling was occupied by a tenant as a dwelling-house, and the defendant pleaded that at the time it was destroyed, and for several days prior thereto, the building was vacant and unoccupied. When the plaintiffs had introduced their evidence and rested, the defendant moved the court to direct the jury to return a verdict for it. The motion was overruled. It should have been sustained. The undisputed facts are that the tenant moved out on Saturday, the twenty-sixth day of September, 1886. The plaintiff lived about one-half mile from the building, and she and her husband, on the next day after the tenant moved out, went to and entered the building and spent some time in examining it. On the next day the plaintiff returned to the house, cleaned one of the rooms, and continued to do so on each day thereafter, including Friday, the first day of October. The house was destroyed by fire on the last-named Friday night. When cleaning the house, the plaintiff would come over in the morning, remaining until noon. She would then go home, get her dinner,

Feshe v. The Council Bluffs Ins. Co.

come back in the afternoon, and then return home in the evening. Plaintiff's father was working near the house, and left at night therein an axe and grub-hoe. The house was not occupied, except as above stated. The house was insured as a dwelling, and the parties contracted that if it became vacant, or ceased to be occupied as such, wholly or partially, the policy should become void. This is the only possible construction of the contract. Our province is to construe and enforce it. The building, between the time the tenant left it and the fire, clearly was not occupied as a dwelling-house, and was at least partially vacant. The plaintiff, when there, did not live or dwell therein, but her home and residence was a half mile distant. Not only so, but the house, to all intents and purposes, was vacant and unoccupied within the true meaning and intent of the policy. There was nothing left or placed in the house which indicated an intent to occupy it as a dwelling at any time. It is true, it had been rented, and a tenant expected to take possession in about two weeks subsequent to the fire, but this is immaterial. The authorities, we think, without a single exception, are in accord with the views above expressed. *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, and authorities cited. See, also, *Fitzgerald v. Conn. Fire Ins. Co.*, 64 Wis. 463; *Sleeper v. N. H. Fire Ins. Co.*, 56 N. H. 401; *Litch v. North British & M. Ins. Co.*, 136 Mass. 491. Counsel for the plaintiff cite and rely on *Shackellon v. Sun Fire Office*, 55 Mich. 288; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; and *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472. These cases are all clearly distinguishable because of the conditions of the policies, or the facts were materially different from those existing in this case. The appellee has filed a motion to strike the evidence from the abstract, on the ground that it is not properly identified; but we think it is, and therefore the motion must be overruled, and the judgment of the district court is

REVERSED.

Shaw v. Des Moines County.

SHAW V. DES MOINES COUNTY *et al.*

Cities and Towns : COLLECTION OF SPECIAL TAXES : CODE, SECTION 481. Under section 481 of the Code, providing that municipal corporations, if by ordinance they so elect, may cause delinquent taxes levied for certain purposes to be certified to the county auditor, etc., such taxes may be so certified, and collected by the county treasurer, as directed in said section, even though the ordinance electing to pursue that method is passed after the work is done for which the tax is levied. (Compare *Dittoe v. City of Davenport*, ante, p. 66.)

Appeal from Des Moines District Court.—HON.
CHARLES H. PHELPS, Judge.

FILED, SEPTEMBER 4, 1888.

ACTION to restrain the collection of a special assessment levied by the city of Burlington for street improvements. The district court denied the relief asked, and rendered judgment in favor of defendants for costs. Plaintiff appeals.

T. J. Trulock, for appellant.

Seerley & Clark, for appellees.

ROBINSON, J.—It is agreed by counsel that “the question to be determined is whether the city can certify special assessments for the improvement of streets to the county auditor, and have them collected by the treasurer through sale of the property,—under its ordinances.” The contract for the improvement in question is dated June 24, 1882, and required the work to be completed on the first day of the next December. The assessment in question was certified after the completion of the work, to-wit, November 25, 1885. The portions of ordinance number twelve of the city which were in force when the contract was let and the improvements

Shaw v. Des Moines County.

were made are as follows: "It shall be lawful for the city council, by resolution describing the street * * * to be improved, and the character of the improvements, to order and direct such improvements, and require the costs and expense thereof to be levied and assessed as a special tax upon the lots * * * fronting the * * * street." "Sec. 10. Immediately upon the assessment and levy * * * the same shall be transferred to * * * the special assessment book. Sec. 11. The auditor shall forthwith issue special tax warrants for the collection of special taxes, and place them in the hands of the treasurer, who shall forthwith proceed to demand and collect said taxes, * * * and at any time after demanded the said city or interested party may bring an action to recover of the owner the amount of such special tax * * * in any court having jurisdiction thereof, and may recover judgment and decree therefor." In July, 1884, and after the improvements had been made, the city adopted an ordinance which contained the following: "Sec. 12. Immediately upon the assessment and levy of a special tax * * * the same shall be transferred to the assessment roll, * * * and, if said special taxes are not paid as herein required, the city shall proceed to collect the same * * * as provided in sections 478, 479-481, of the Code of Iowa, as it may elect. Sec. 13. In all cases in which the city council shall have heretofore ordered any improvement, or made any special assessment for any of the purposes provided herein, and by any section of ordinance number twelve of the revised ordinances, * * * all sections hereof shall apply thereto."

It is not denied that the special assessments in controversy are within the terms of the sections last quoted, but it seems to be the thought of appellant that they are not applicable, for the reason that they were not adopted until after the improvements in question had been made. It appears to be conceded that the proceedings sought to be enjoined are authorized by the ordinances of 1884, if the provisions of section 481 of the Code can be given a retrospective effect. The ordinance in force when the

 Reid v. Reid.

improvements were ordered and made authorized the city council to assess the expense thereof, as a special tax, upon the lots fronting the street. That was done in this case, and no question is made as to the amount or legality of the assessment, but only as to the method of collecting it. We held in the case of *Dittoe v. City of Davenport*, ante, p. 66, that the right to recover an assessment of this character depends upon the doing of the work in the manner and for the purposes provided by law, and that methods of collection authorized by the Code might be adopted at any time. This case is governed by the rule announced in that, and will therefore be

AFFIRMED.

74	681
132	207
132	391

REID V. REID.

Divorce : SUBSEQUENT ACTION FOR SUPPORT OF CHILD : WHAT MUST BE SHOWN. Where a decree of divorce has been granted, and the custody of a child awarded to plaintiff, and a judgment of a certain sum as alimony has been rendered in her favor, this is conclusive on the parties so long as the circumstances remain the same ; and a subsequent supplemental proceeding, or independent action, seeking to recover an additional sum for the support of the child, cannot be maintained without alleging such change in the circumstances of the parties as would make an additional order expedient. (See Code, sec. 2229.)

Appeal from Des Moines District Court.—HON.
CHARLES H. PHELPS, Judge.

FILED, SEPTEMBER 4, 1888.

THE plaintiff in this action demands a judgment against the defendant for three hundred dollars. There was a demurrer to the petition, which was sustained. Plaintiff appeals.

T. J. Trulock, for appellant.

W. B. Culbertson, for appellee.

ROTHROCK, J.—It appears from the petition that the plaintiff and the defendant were formerly husband and wife, and that on the ninth day of December, 1886, they were divorced upon the complaint of the plaintiff, who was awarded the care and custody of their minor child, and a judgment of one hundred dollars as alimony. It is alleged that the plaintiff, at the time of the divorce, was broken down in health, and greatly impoverished; and that defendant is a strong, active, industrious man, and earns, in his business as a bridge-builder, from \$1.75 to \$4 a day; and that he does not and has not contributed anything to the support of the child; and that plaintiff is not able to earn a living for said child and herself.

The principal ground of the demurrer to the petition is that this is an action for alimony, and cannot be maintained without a showing that the circumstances of the parties have changed since the decree for divorce and judgment for alimony were rendered. It is to be observed that the petition is not presented to the court as supplemental to the original suit for divorce. It is upon its face an original proceeding to compel the defendant to support the child by awarding money to the plaintiff for that purpose. It is provided by section 2229 of the Code that, "when a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties, as shall be right and proper; subsequent changes may be made by the court in these respects when circumstances render them expedient." It must be conceded that the decree is an adjudication, unless there has been a change of the circumstances of the parties. In *Blythe v. Blythe*, 25 Iowa, 266, and *Wilde v. Wilde*, 36 Iowa, 319, it was held that the court granting the decree has no power to grant a new trial of the case, but only the power to adapt the decree to the new or changed circumstances of the parties. The district court held that the demand made by the plaintiff was in the nature of a demand for alimony. If this be correct, the order sustaining the demurrer to the petition was unquestionably correct; for, even if the

Wertz v. Merritt.

petition be regarded as a supplementary proceeding, as it ought to be, there is no averment of a changed condition of the parties authorizing any proceeding whatever. But the plaintiff insists that this is not a suit for alimony; that it is brought to compel the defendant to support the child. It may be that the defendant, as the parent of the child, is liable for necessities furnished for its support. But, in the action for divorce, the questions as to the right of the plaintiff to alimony, the custody of the child, and the division of the property of the parties were all submitted to the court; and we think it is very clear that the decree was an adjudication, as between these parties, of every question presented. If the plaintiff was by the decree burdened with the custody of the child, it was by her own choice, and she cannot demand a modification of the decree without showing that the circumstances of the parties have changed so as to require an additional allowance. We think the demurrer to the petition was properly sustained.

AFFIRMED.

74	683
79	281
74	683
122	404
74	683
d126	192

WERTZ V. MERRITT BROS. *et al.*

1. **Evidence : TRANSACTIONS WITH ONE DECEASED.** In an action by one of several heirs to partition land, a part of which had long been occupied by another of the heirs, *held* that the oral testimony of the occupying heir and his wife, as to an agreement of the ancestor to give the occupied land to him, was incompetent, under section 3689 of the Code.
2. **Gift : OF LAND TO SON : EVIDENCE.** A son occupied a portion of his father's land for twenty years prior to the father's death, and afterwards claimed that he owned the land under a verbal agreement (which he had performed on his part) that he was to occupy and cultivate the land during the father's life, giving him one-third of the crops, and afterwards to be the sole owner of the land. *Held* that the evidence (for which see opinion) did not support his claim.

Wertz v. Merritt.

8. **Homestead : IN LEASEHOLD INTEREST : TENANCY IN COMMON : JUDGMENT LIEN.** M. obtained a judgment against J. on the ninth day of June, 1886, on a debt which was contracted in the fall of 1885, and the question was whether it was a lien on the portion of real estate which was afterwards allotted to him upon a partition of the land of his father, who died May 24, 1886. J. had occupied the land in question as a tenant of his father for twenty years prior to the latter's death ; but, conceding that he had a homestead right in his leasehold estate (see *Pelan v. De Bevard*, 13 Iowa, 53), that right did not survive that estate, which, by the terms of the lease, ended with the father's death ; or, if he be regarded thereafter as a tenant at will, his right could have been terminated on the first day of March following his father's death (Code, secs. 2014, 2015), so that he could not, after that date, base any claim of homestead upon any interest he had in the land prior to his father's death. Nor could he base a claim of homestead upon the ground that he was a tenant in common with his co-heirs (see *Thorn v. Thorn*, 14 Iowa, 53), because such tenancy, if conceded, could not have begun prior to his father's death ; but that was after the debt had been contracted on which the judgment was obtained. Accordingly held that the land was not exempt as a homestead.

Appeal from Des Moines District Court.—HON.
CHARLES H. PHELPS, Judge.

FILED, SEPTEMBER 4, 1888.

THE petition of plaintiff alleges that on the twenty-fourth day of May, 1886, Benjamin Wertz died intestate, seized in fee of the west half of the southeast quarter, and east half of the southwest quarter, of section ten, and the east half of the northeast quarter of section twenty-one, all in township sixty-eight north, of range eighteen west ; that defendant Mary J. Wertz is the widow of decedent, and as such is entitled to an undivided one-third of said premises ; that plaintiff and defendants Joseph Wertz and Arthelia Wentworth are the only heirs of decedent, and that as such each is entitled to an undivided one-third of two-thirds of said premises ; that plaintiff has resided in the southeast quarter of the southwest quarter of said section ten since the year 1868, and has at his own expense built a dwelling-house, and made other improvements thereon. Plaintiff asks for a partition of the premises, and that he be allowed the value of said improvements, in the making of the

Wertz v. Merritt.

partition. The death of Benjamin Wertz intestate, and the relationship of the parties to him, are admitted. Defendants Mary J. Wertz and Arthelia Wentworth deny that plaintiff is entitled to any allowance for improvements. Joseph Wertz claims to have occupied the east half of the west half of the southeast quarter of said section ten since 1866, under a verbal agreement with decedent, whereby he was to occupy and live upon it during the lifetime of decedent, and pay him one-third of the crops raised thereon; the property so occupied to belong to said Joseph. He also claims that he fulfilled on his part all the requirements of said agreement, and built a dwelling-house and made other improvements on said forty-acre tract; that he is now, and has been since 1866, the head of a family, and during that time has occupied said tract as a homestead; that he is now the unqualified owner of this tract, and it is not subject to partition proceedings, nor to the payment of his debts. Defendants Merritt Bros. became parties to the suit, and claim to have recovered, on the ninth day of June, 1886, a judgment against Joseph, which was a lien on his interest in decedent's land; that such interest was sold under an execution issued on said judgment; and that they are entitled to be subrogated to all the rights of Joseph in said land. They unite with plaintiff and with defendants Mary J. Wertz and Arthelia Wentworth in denying the special rights in the forty-acre tract, and the agreement with decedent alleged by plaintiff. The court below found the interests of the widow and heirs to be as alleged in the petition, that plaintiff and Joseph were entitled to compensation for improvements, and that partition of the premises should be made. Partition was ordered, and referees were appointed to carry the order into effect. The referees entered upon the discharge of their duties, and made a report, which was confirmed by the court. This shows that thirty-six acres off of the east side of the west half of the southeast quarter of said section ten, or nearly all of the tract claimed by Joseph, were

Wertz v. Merritt.

allotted to him. A decree was entered, which established the homestead claim of Joseph, and denied Merritt Bros. the relief they ask. Merritt Bros. appeal from the decree against them and in favor of Joseph, and the latter appeals from so much of the decree as caused the tract claimed by him in fee to be included in the partition proceedings and denied his claim thereto.

T. M. Fee, for appellants Merritt Bros., and for appellees Mary J. Wertz and Arthelia Wentworth.

J. A. Elliott and *Geo. D. Porter*, for appellant Joseph Wertz.

L. C. Mechem, for appellee B. F. Wertz.

ROBINSON, J.—I. It is insisted on the part of Joseph Wertz that the evidence is sufficient to establish his alleged ownership of the forty-acre tract which he claims; but in this view we do not concur. The evidence of Joseph Wertz and wife as to the alleged verbal agreement with decedent is made incompetent by section 3639 of the Code, and must be disregarded. There is conflict in the evidence as to this issue; some of the admissions of Joseph tending to show that after the death of his father he made no claim of right to this tract, but expressed a desire to obtain it. The evidence shows that decedent had at different times expressed an intention to give this tract to Joseph, but that he never fully decided to do so. During the twenty years Joseph occupied the land, it was sometimes farmed by himself alone, sometimes by himself and brother, the plaintiff, and sometimes, perhaps, by his brother alone. It is unnecessary to state the evidence more fully. In our opinion it fails to sustain the claim of Joseph that he became the owner of the land by virtue of an agreement with decedent. It was therefore properly treated as a part of the land to be partitioned.

II. It is next urged that the evidence shows beyond question that Joseph occupied the forty-acre

1. EVIDENCE :
transactions
with one de-
ceased.

2. GIFT : of land
to son : evi-
dence.

Wertz v. Merritt.

tract claimed by him, including all that allotted to him by the partition proceedings, for more than twenty years, or since 1866; that during all that time he was the head of a family, and occupied the tract as a homestead; that such occupation has at all times continued since the death of his father, the decedent; and that for that reason the land allotted to him is not subject to the payment of the judgment of Merritt Bros. The occupation by Joseph may be conceded as claimed, and it may also be conceded that a homestead right may be acquired in a leasehold estate. *Pelan v. De Bevard*, 13 Iowa, 53. We think the evidence shows that Joseph was the tenant of his father from 1866 to the death of the latter, and that during that time he had a homestead interest in the land upon which he lived. But Joseph does not base his claim upon any leasehold interest. By the showing of his answer, his obligation to pay a share of the crop terminated with the death of his father. But, assuming that he was a tenant at will, his right could have been terminated on the first day of March, 1887. Code, secs. 2014, 2015. Therefore his present right is not derived from any interest he had in the land prior to May 24, 1886. It is urged that he was a tenant in common, and that as such he acquired a homestead right to the tract he occupied. This court has held that such a right may be acquired by a tenant in common. *Thorn v. Thorn*, 14 Iowa, 53. If we concede that Joseph was a tenant in common, his tenancy as such commenced with the death of his father at the earliest, and his present homestead right cannot antedate that time. The evidence shows that the debt on which the judgment in favor of Merritt Bros. was rendered was in existence as early as the fall of 1885; therefore, unless the present homestead right is a continuation of the former one, the land is subject to the lien of the Merritt Bros. judgment. We know of no rule of law which would justify us in holding that there was such a continuation of the homestead right. The leasehold right was entirely independent of that now held.

8. HOMESTEAD :
in leasehold
interest : ten-
ancy in com-
mon : judg-
ment lien.

 Riordan v. Guggerty.

The present right did not in any manner flow from the former. While it is true that a part of the land formerly occupied by Joseph was allotted to him by the referees, yet he had no legal right to compel such allotment. It was not the case of a tenant in common who as such had entered into possession of a part of the common estate, and made valuable improvements thereon with the assent of his co-tenants. In this case no possession was taken, nor were any improvements made after the estate in common became vested. Prior to the death of his father, Joseph had no vested right in anything except the right to occupy the land by the year, and possibly the right to compensation for improvements. We therefore conclude that the land allotted to Joseph Wertz was subject to the payment of the judgment in favor of Merritt Bros., and that the district court should have so decreed. The decree is affirmed as to the appeal of Joseph Wertz, and as to the appeal of Merritt Bros., it is

REVERSED.

 RIORDAN V. GUGGERTY.

1. **Evidence : CROSS-EXAMINATION : CHARGE OF FRAUD : DISCRETION OF COURT.** In an action on a promissory note which defendant alleged to have been forged, plaintiff testified that he saw defendant sign the note, and on cross-examination he was asked as to circumstances connected with the making of the note; none of the questions referring directly to any fact testified to on the examination in chief. *Held* that, while the questions might well have been allowed under the rule which grants considerable latitude when an issue of bad faith on the part of the witness is raised, yet it was a matter largely within the discretion of the court, and that this court could not well interfere, in view of the fact that not all of the collateral evidence is presented in the abstract.
2. ——— : **OBJECTIONS TO EVIDENCE ELICITED BY SELF.** A party cannot be heard to object to testimony which he causes to be given by the cross-examination of his adversary's witnesses.
3. ——— : **SIGNATURES : COMPARISONS BY EXPERTS.** No valid objection can be made to the testimony of experts as to the characteristics of different signatures, where it is confined to the signature in controversy, and to others admitted to be genuine. (See Code, sec. 3655.)

74	688
112	432
74	688
128	158

Riordan v. Guggerty.

4. ——— : NOT RELEVANT TO ISSUE. Upon a claim for a failure to pay over rents actually collected, evidence as to the rental value of the buildings is irrelevant.
5. ——— : CROSS-EXAMINATION : RELEVANCY AND WEIGHT. A written statement of account made by plaintiff to defendant relevant to the matter in controversy between them, which was called out in the cross-examination of defendant, and with regard to which he made admissions inconsistent with his examination in chief, was properly admitted as a part of the cross-examination, though not of much weight.
6. ——— : ACTION ON ACCOUNT : METHODS OF DEALING. On the issue raised by a counter-claim for rents collected, plaintiff was properly permitted to detail his method of dealing with defendant during the time in question, including the manner of keeping books and making statements and settlements.
7. ——— : REFRESHING MEMORY : USE OF STUB-BOOK. A witness may use a stub-book of checks to refresh his memory as to payments made by him. (Compare *State v. Miller*, 53 Iowa, 154, and *Hull v. Alexander*, 26 Iowa, 569.)
8. ——— : COPY OF TELEGRAM : FOUNDATION. Where the uncontradicted evidence showed that it was the custom to destroy the originals of telegrams after six months, and that the original of the one in question could not be found, this was sufficient foundation for the introduction of a copy, without proving the rule of the company for destroying the originals.
9. Appeal : ERRORS ASSIGNED BUT NOT ARGUED. Errors assigned but not argued will not be considered by this court.

Appeal from Wapello District Court.—HON. H. C.
TRAVERSE, Judge.

FILED, SEPTEMBER 4, 1888.

THE plaintiff seeks to recover the amount appearing to be due on a promissory note for four hundred dollars, dated November 26, 1877, payable to plaintiff one day after date, and purporting to be signed by defendant. The answer of defendant is under oath, and denies the making of the note ; alleging that the signature thereto is a forgery. It further alleges that, if defendant made the note, plaintiff has been fully paid all sums which defendant ever owed him. By way of counter-claim,

 Riordan v. Guggerty.

the defendant asks to recover of plaintiff \$437.50 for rents alleged to have been collected by plaintiff for defendant, and to be unaccounted for. The jury found specially that defendant made the note in suit, and that there was due to him on his counter-claim the sum of \$118.57. A judgment on their general verdict was rendered in favor of plaintiff. The defendant appeals.

W. W. Cory, E. L. Burton and P. H. Riordan,
for appellant.

W. S. Coen and McNett & Tisdale, for appellee.

ROBINSON, J.—I. The plaintiff, on his direct examination, testified as follows: “Mr. Guggerty signed the note in my presence. I saw him sign it. The signature is his. I am positive of it.” On cross-examination he was asked, as to the consideration of the note, how its amount was determined, for what the money for which it was given was paid, and other questions of a similar nature. He was also asked if he had ever presented the note to defendant prior to A. D. 1885. These questions were objected to by plaintiff on the ground that they were improper on cross-examination, and the objections were sustained. It is insisted by appellant that in sustaining these objections the court erred. None of the questions referred directly to any fact testified to on direct examination. It is the general rule that “a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matter stated in his direct examination; and that, if he wishes to examine him as to other matter, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause.” 1 Greenl. Ev. sec. 445. It is usual, however, and proper, to allow considerable latitude on cross-examination, where fraud in which the witness is concerned is alleged. In view of the issue of bad faith which the answer necessarily presented, we think the questions objected to might properly have been allowed. They referred to matters

1. EVIDENCE:
cross-exam-
ination:
charge of
fraud: dis-
cretion of
court.

 Riordan v. Guggerty.

involved in the execution of the note, and which must have been considered at the time it was signed. But the ruling complained of rested to some extent within the sound legal discretion of the trial court; and, in view of the facts in this case, we cannot say that such discretion was abused. There is no statement in the abstract that it contains all the evidence submitted, and appellee insists that some of the evidence pertinent to the questions involved in this ruling has not been abstracted. This is not denied by appellant. The abstract shows that plaintiff was examined at length in regard to business transactions between himself and defendant during a subsequent part of the trial. These transactions occurred both before and after the date of the note. In this state of the record, we cannot hold that there was error in the rulings in question.

II. Certain witnesses, examined with reference to the genuineness of the signature to the note in suit,

2. — : objections to evidence elicited by self.

were permitted to testify as to the characteristics of different signatures in evidence, including that attached to the note, the comparative size and length of these signatures, whether written on or above or below the lines designed for them, the differences in certain letters, and other facts of like character. It is insisted by appellant that the court erred in permitting this testimony to be introduced,

3. — : signatures: comparisons by experts.

for the reason that the facts to which it was directed did not require the testimony of an expert, but could have been determined by the jury. There are at least two answers to this claim of appellant: (1) He first caused it to be given by the cross-examination of plaintiff's witness. (2) It was confined to the signature in controversy, and to others admitted to be genuine, and was therefore authorized by section 3655 of the Code.

III. The plaintiff had charge of certain buildings, some of which were owned by defendant and some by defendant and another. Defendant sought

4. — : not relevant to issue.

to show the demand for and rental value of such property at times when they were in charge of

 Riordan v. Guggerty.

plaintiff, but the evidence offered for that purpose was excluded, on the objections of plaintiff. Appellant insists that in this there was error. In our opinion, the ruling was correct. The answer of defendant does not charge plaintiff with failure to lease the property and collect the rents, but with failure to pay over rents actually collected. The evidence rejected was therefore not relevant to any issue raised by the pleadings.

IV. On cross-examination the defendant was asked in regard to a written statement of rents collected and money paid out. He stated that he had received it from plaintiff, and it was then offered in evidence as a part of his cross-examination. Its admission was objected to by defendant, and is assigned as error. Defendant had testified on his direct examination that plaintiff had not paid him any rent since 1879. He had also testified that the last settlement he had with plaintiff was made in January, 1882. The written statement in question includes the time from April 15, 1881, to April, 1883. It was relevant to the issues and to the matters concerning which defendant had been testifying. He had testified at length in regard to business transactions between the parties, and this statement related to them. It may not have been entitled to much weight, but it tended to contradict evidence given by defendant on direct examination, when considered with his admissions in regard to it. We think its introduction was proper.

V. Appellant complains that plaintiff was permitted to detail his method of dealing with defendant during the time in question, including the manner of keeping books and making statements and settlements. We think this was entirely proper, as tending to explain the business relations of the parties, the liability to error, and the means of knowledge within the reach of defendant as to the correctness of the statements and settlements. Some of the questions were not to be commended in all

5. — : cross-examination : relevancy and weight.

6. — : action on account : methods of dealing.

 Riordan v. Guggerty.

respects, but they were not of a nature to cause prejudice.

VI. Appellant insists that the court erred in permitting plaintiff to testify, from an examination of a stub check-book, as to payments made by him on account of defendant. The witness, after being informed by the court that he could not testify from the stub-book, but that it could be used only to refresh his memory, stated that he testified from memory, as refreshed by an examination of the *memoranda* of the stub-book. It was the privilege of defendant to cross-examine as to the recollection of the witness, and the province of the jury to determine its value. The use of the stub-book for the purpose indicated by the court was authorized. *State v. Miller*, 53 Iowa, 154; *Hull v. Alexander*, 26 Iowa, 569.

VII. The plaintiff claimed that he sent three hundred dollars from Ottumwa to the defendant at Chillicothe in 1880, in response to a telegram from the latter. The sending of the telegram and the receipt of the money were denied by defendant. The plaintiff introduced evidence of employees in the Ottumwa and Chillicothe offices to show that the original of the telegram could not be found, and that it was the rule and custom of the offices not to preserve such papers after the lapse of six months, but to destroy them. He also introduced evidence to show that the copy of the telegram in question was in the handwriting of a former employe of the Ottumwa office, that the money had been sent to defendant by express, and had been received by him. The copy of the telegram was admitted "to show how Riordan came to send the money, if he did send it, or on what he acted." Appellant contends that in this there was error, and that the rule of the offices in regard to destroying original dispatches should have been introduced. Appellee claims that the abstract does not contain all the evidence given on this subject. Since the abstract does not purport to contain all such evidence, we might well refuse to review the ruling in

7. — : refresh-
ing memory :
use of stub-
book.

8. — : copy of
telegram :
foundation.

Riordan v. Guggerty.

question. But we are satisfied, from what the abstract contains, that there was no error in this ruling. There is no showing that the rule of the office was in print or writing, and whether it was or not is immaterial, for the reason that the uncontradicted evidence showed that it was the custom to destroy such dispatches after six months, and the dispatch in question could not be found. If any foundation for the introduction of the copy delivered to plaintiff was required, we think it was fully laid for the use of the paper for the purpose indicated by the court.

VIII. The plaintiff introduced in evidence a number of statements of account, the originals or copies of which had been delivered to defendant. The appellant complains of the introduction of these statements, and of the charge of the court in regard to them. The evidence justified their introduction, and we discover no error in the charge of the court. The real objection of appellant seems to be the alleged insufficiency of the evidence to justify the jury in finding that they were accounts stated. That question, however, we do not feel called upon to decide.

IX. The assignment of errors covers eleven printed pages. It raises many questions, some of which are hardly noticed by counsel. Others are merely stated in the argument, and therefore, under the well-known practice of this court, do not require further consideration. Other questions are discussed by counsel, but are not of sufficient general interest to justify us in making extended mention of them. Among these are the rulings of the court in refusing instructions, and in giving certain portions of its charge, and in failing to instruct the jury more fully. It is sufficient for us to say that we think that the jury were charged fairly and quite fully as to their duties, and that we discover no prejudicial error in any of the rulings of the court which are argued by counsel.

9. APPEAL :
errors as-
signed but
not argued.

AFFIRMED.

THE STATE V. MERKLEY *et al.*

1. **Assault With Intent to Kill: REFUSING TO NOURISH CHILD: INDICTMENT.** An indictment for an assault with intent to kill an adopted daughter of defendants, of eleven years of age, by neglecting and refusing to nourish her, is insufficient, where it fails to charge that defendants had the means and were pecuniarily able to provide for her.
2. **Appeal: CRIMINAL CASE: CONVICTION ON BAD COUNT.** Where a defendant has been convicted of a crime charged in two counts, and, on appeal, one of the counts is found to be bad, and it cannot be said on which count he was found guilty, the judgment must be reversed.
3. **Criminal Law: EXAMINATION OF DEFENDANT BY COURT.** A defendant is not required to testify against himself; nor can he legitimately be placed in the position of admitting or denying, in the presence of the jury, in answer to questions put by the court, anything having a material bearing on his guilt.
4. **Assault With Intent to Kill: EVIDENCE OF SUCCESSIVE ASSAULTS.** On a trial for assault with intent to murder, although the indictment charges only one offense, the state may prove successive offenses of the kind charged, for the purpose of establishing the intent. (Compare *State v. Jamison*, ante, p. 613.)

Appeal from Appanoose District Court.—HON. DELL STUART, Judge.

FILED, SEPTEMBER 4, 1888.

INDICTMENT for an assault with intent to commit murder. Trial by jury; verdict, "Guilty of an assault with intent to commit manslaughter;" judgment; and the defendants appeal.

Mabry & Morrison, for appellants.

A. J. Baker, Attorney General, *George D. Porter* and *J. A. Elliott*, for the State.

The State v. Merkley.

SEEVERS, C. J.—There are two counts in the indictment. The first charges that on the tenth day of October, 1887, the defendants, with a hot iron, did feloniously, wilfully and maliciously make an assault in and upon Maggie Vermulin, and with said iron burn and mutilate, beat and bruise the body, arms and legs of said Maggie, with intent to kill and murder. The second count charges that the assault was made with a hot iron, and by beating and striking with a stick of wood, and that the defendants did then and there wilfully, intentionally, unreasonably expose Maggie Vermulin “to the rigors of the weather, by forcing the said Maggie from shelter out into the cold and severe weather, where she would endanger her life, freeze and die, said Maggie not being properly clad; and said defendant did then and there feloniously, wilfully, intentionally, unlawfully and maliciously neglect and refuse to nourish the said Maggie Vermulin, as they were under legal obligations to do, she being their adopted daughter of eleven years of age, and under their care and control, *’ *’ *’ with the specific, felonious and unlawful intent the said Maggie Vermulin then and there to kill and murder.”

I. Upon the state offering evidence to support the indictment, the defendants objected thereto, because two or more distinct offenses were charged in the indictment, and also at the proper time moved the court to require the state to elect upon which count it would try the defendants. The objection was overruled, and the court refused to require the state to elect. The state proceeded to introduce evidence, and it tended to show that the defendants burned the said Maggie by applying to her body a hot iron on three different occasions, about one week apart. Thereupon the defendants moved the court to require the state to elect upon which of such burnings it would rely for a conviction. This motion was overruled. Thereupon the state offered evidence tending to show that the said Maggie had been starved, and not provided with sufficient food by defendants. To this evidence the defendants objected, on the ground

The State v. Merkley.

that it tended to establish a separate and distinct offense. The objection was overruled, and the defendants again moved the court to require the state to elect upon which offense charged in the second count it would ask a conviction, and the state elected that a conviction would be asked on the allegations in the second count, that defendants had neglected and refused to nourish, sustain and provide for the said Maggie, as they were under legal obligations to do.

II. The defendants objected to the introduction of any evidence under the second count in the indictment, upon the ground that no crime was charged, and we think the court erred in holding that a crime was charged, and in submitting to the jury the issue arising under such count.

1. ASSAULT with intent to kill: refusing to nourish child: indictment.

It will be observed that the indictment fails to charge that the defendants had the means or were pecuniarily able to provide food and the necessaries of life for their adopted child, and this is an essential ingredient of the crime charged. Am. Crim. Law (5 Ed.) p. 7, secs. 10, 11; 2 Bish. Crim. Law, sec. 643; 1 Whart. Prec. 163; *State v. Smith*, 65 Me. 257. It cannot be said that a man is criminally liable for failure to perform a duty unless it is in his power, and he has the means and ability to perform such duty. As it is impossible to tell under which count the defendants were found guilty, therefore the judgment must be reversed. It is due to the district court that we should say that it is doubtful, if not certain, that the ground of our decision was not expressly presented to such court; but this, under the statute, is immaterial. Code, sec. 4538.

2. APPEAL: criminal case: conviction on bad count.

III. It will be observed that the indictment charges that Maggie Vermulin was the adopted daughter of the defendants. The state asked permission of

3. CRIMINAL law: examination of defendant by court.

the court to "place the defendants on the witness-stand, for the purpose of examining them as to the whereabouts of the papers of adoption of Maggie Vermulin, and the defendants objected to the state examining the defendants, for the

The State v. Merkley.

reason that they are not bound to take the witness-stand against themselves, unless of their own motion. The court sustained the motion. Then the court asked each of the defendants if they knew where the adoption papers were, or if they had them in their possession, and each of the defendants answered that they did not have the papers, and did not know where they were. The defendants excepted to the court's asking the defendants any questions in the presence of the jury." The foregoing is a literal copy of the record. We possibly may assume that the adoption papers were regarded as material for the purpose of showing that it was the legal duty of the defendants to provide for and maintain Maggie Vermulin. This being so, we think the court erred in making the inquiry it did. It must be beyond controversy that the defendants could not be compelled to give evidence against themselves, nor could they be placed legitimately in the position of admitting or denying, in the presence of the jury, anything having a material bearing on their guilt. Whether, in view of the answer to the inquiry, and the whole record, the defendants were in any respect prejudiced by what the court did, we have no occasion to determine.

IV. Upon another trial we shall assume that the defendants will not be required to defend against the second count in the indictment. Therefore, the only material question to be determined is whether evidence of successive burnings, about one week apart, is admissible under the first count, which charges but a single offense, and that is an attempt to commit murder, which, however, since the finding of the jury, must be regarded as having been reduced to an intent to commit manslaughter. The state must establish the requisite intent, and, therefore, may and is entitled to introduce evidence of distinct and different burnings, although they may constitute distinct crimes. *State v. Jamison, ante*, p. 613.

Other errors are relied on, but we think they will not arise on another trial, and, therefore, they are not considered.

REVERSED.

 Conley, Intervenor, v. Zerber.

CONLEY, INTERVENOR, v. ZERBER.

Intoxicating Liquors: NUISANCE: PARTIES PLAINTIFF: INTERVENTION. Where one citizen of a county has brought an action to restrain and abate a liquor nuisance, another citizen of the same county has no right to intervene and join the plaintiff in the prosecution, because the right of intervention, as given by section 2688 of the Code, must be based on a private interest; while no private interest is involved in the case referred to, but the action is brought wholly for the public benefit.

Appeal from Des Moines District Court.—HON.
CHARLES H. PHELPS, Judge.

FILED, SEPTEMBER 4, 1888.

ON the sixth of June, 1887, one Thomas Fennell filed his petition in the district court, in which he alleged that defendant occupied a certain building in the city of Burlington, in which he carried on the business of selling intoxicating liquors, contrary to law, and in which he prayed that a writ of injunction might issue restraining the defendant from maintaining such nuisance, and for an order for the abatement of the same. The petition also alleged that Fennell is a citizen of Des Moines county. On the nineteenth of the following September, appellant filed a petition of intervention, in which he alleged that he is a citizen of said county, and as such has the same interest in the matter in litigation that plaintiff has, and he prayed that he be permitted to unite with plaintiff in the prosecution of the action. On defendant's motion, this petition was stricken from the files, and from that order intervenor appeals.

A. H. Stutsman, Newman & Blake and J. C. Power, for appellant.

Dodge & Dodge, for appellee.

74	699
78	717
74	699
85	101
74	699
89	564
74	699
93	25
74	699
119	517
74	699
131	294

Conley, Intervenor, v. Zerber.

REED, J.—The right to intervene in an action between other parties is given by section 2683 of the Code, which is as follows: “Any person who has an interest, in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both plaintiff and defendant, either before or after issue has been joined in the cause, and before the trial commences.” It will be observed that an interest in the matter in litigation is essential to the right of intervention created by this provision. Chapter 143, Acts Twentieth General Assembly, and chapter 66, Acts Twenty-first General Assembly, confer upon the citizens of the different counties of the state the right to institute and maintain actions for the abatement of nuisances in their respective counties of the character of that which defendant is charged in the petition with maintaining. The question which we are required to determine is whether by those provisions one citizen has such an interest in the matter in litigation as entitles him to intervene in an action instituted by another citizen of the county for the abatement of a nuisance of that character; and we are of the opinion that no such interest arises under those provisions. The right conferred by them upon the citizen is a mere naked right to maintain the action. That right does not include an interest in the matter in litigation, but is something entirely distinct from that. The only fact essential to its exercise is that of citizenship in the county. The action is maintained for the protection of a public right or the redress of a public wrong; and no private interest of the plaintiff is involved, but he is permitted to maintain it for the public benefit. *Littleton v. Fritz*, 65 Iowa, 488; *Applegate v. Winebrenner*, 66 Iowa, 67. But the interest which will entitle a party to intervene, under section 2683, must be of a private

 Sweny v. Bruns.

nature ; that is, he can intervene only for the enforcement or protection of some private right, or the prevention or redress of some private wrong. This is the obvious meaning of the provision. The language of the section must be construed with reference to the facts as they existed when it was enacted. Its scope and effect are not enlarged by the subsequent enactments referred to, for they relate to a different subject. When the section was enacted, a civil action could be maintained by a private party only for "the enforcement or protection of a private right, or the prevention or redress of a private wrong." Code, sec. 2505. By the words "an interest in the matter in litigation" was meant such interest as would afford the intervenor a right of action ; that is, if he had such right or interest as entitled him to maintain an action, he is permitted by that section to intervene in any suit between other parties in which the same subject-matter is involved. The action of the court in striking intervenor's petition from the files is clearly right.

AFFIRMED.

74 701
78 434

SWENY V. BRUNS.

Adverse Possession : TITLE BY : EVIDENCE. In 1868 or 1869 plaintiff owned a certain lot, but did not own any adjacent land. Defendant claims that plaintiff then agreed with defendant's grantor that the latter should fence the lot and pay the taxes. Defendant's grantor built the fence, but built it so as to include more land than the lot contained, which additional land was included in a tract bought by plaintiff in 1886. In 1871 plaintiff conveyed to defendant's grantor the lot intended to be fenced, and defendant, having, by himself and grantor, been in possession of the fenced land for more than ten years, now claims title to the excess of land by adverse possession, on the ground that plaintiff directed the fence to be built where it was. But *held* that, before defendant could invoke the doctrine of adverse possession, he had to establish, by a preponderance of the evidence, (1) that plaintiff directed the fence to be built where it was, and (2) that defendant's grantor intended to include more land within the fence than was included within the lot, and was not merely mistaken as to where the boundary was ; both of which propositions defendant failed to establish.

Sweny v. Bruns.

Appeal from Des Moines' District Court.—HON.
CHARLES H. PHELPS, Judge.

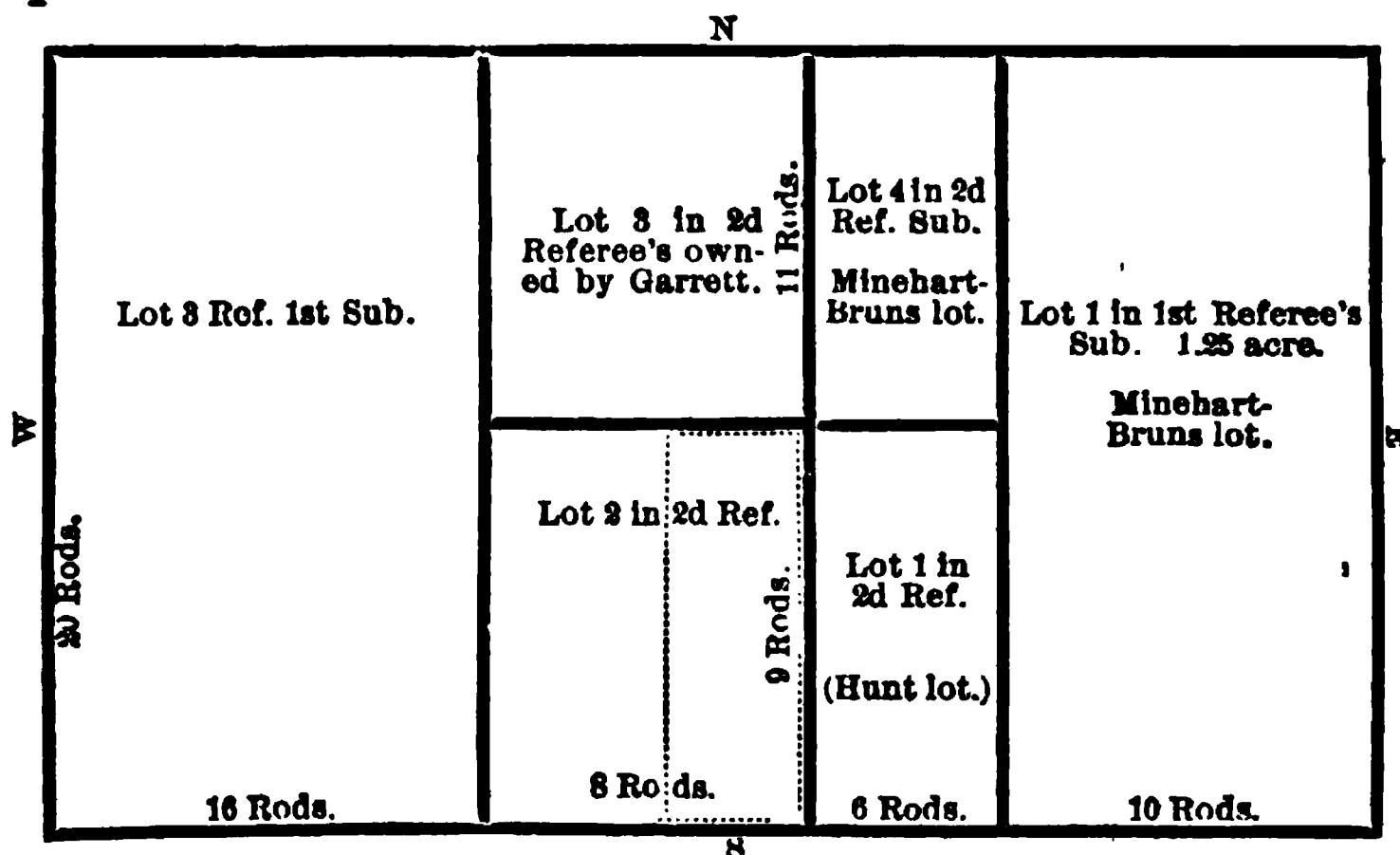
FILED, SEPTEMBER 4, 1888.

ACTION to recover possession of real estate. Judgment for plaintiff and defendant appeals.

Power & Huston, for appellant.

Geo. H. Lane and *A. H. Stutsman*, for appellee.

SEEVERS, C. J.—The following plat is deemed material to a proper understanding of the controverted question in this case :



The land in controversy is so much of lot two as is embraced within the dotted lines. In 1886, Minehart, the defendant's grantor, owned lot one in Referee's first subdivision, and lot four, as indicated on the plat. The plaintiff at that time owned lot one, or the Hunt lot, as designated on the plat, and other persons owned lot two. The defendant claims that in the year 1868 or 1869 an arrangement was made between Minehart and the plaintiff, whereby the former was to fence the Hunt lot, and pay the taxes thereon; and he claims that the plaintiff at that time directed him where to put his fence, and he

Sweny v. Bruns.

so placed it, as shown by the dotted lines. The defendant and his grantors have been in possession thereof ever since that time. Afterwards, in 1871, Minehart purchased, and the plaintiff conveyed to him by warranty deed, the Hunt lot. The defendant claims that he and his grantors have been in adverse possession of the land in controversy under a claim of right for more than ten years, and that the plaintiff is estopped from setting up any right or title thereto. The plaintiff claims that he never gave Minehart the right to fence, but, if he did, he did not know where the line was, and that he only gave permission to fence the Hunt lot. The plaintiff had knowledge of the existence of the fence at all times afterwards, but he did not know that it included the land in controversy until he purchased lot number two, in 1886. It is a controverted question whether the plaintiff directed or indicated that the defendant's grantor should erect the fence where he did, and also whether defendant's grantor supposed, believed, or intended to include within the fence any land other than the Hunt lot. Before the defendant can invoke adverse possession under a claim of right, he must establish, by a preponderance of the evidence, both of the foregoing propositions. We think he has failed to do so. It is true the defendant's grantor so testifies. He, however, only intended to fence the Hunt lot; but supposed the boundary line thereof to be where he placed the fence, as he testifies, by the plaintiff's direction. The plaintiff testifies that the defendant's grantor is mistaken, and that he "made no representations in regard to the line," and "never had any talk with him about pulling down a fence." Neither of these witnesses is corroborated in any material degree; and, as the burden is on the defendant, we think he has failed to establish the essential proposition upon which his defense is based. It is true, the plaintiff testifies that, after the fence was erected, he came to the conclusion that the defendant's grantor did not intend to comply with his contract, and he then directed him to remove the fence. This, however, has no tendency to establish that he ever gave

The State v. Schaffer.

leave to fence, and certainly it does not tend to prove that he indicated where it should be erected. For the reason that he undoubtedly knew of the existence of the fence, it is just as clear he did not know the boundary of the Hunt lot. He may have supposed that the Hunt lot alone was fenced, but this is immaterial, unless it tends to establish that he directed or indicated that the fence should be placed where it was. Counsel for the defendant cite several decisions of this court in which the controversy was between owners of abutting property. Such decisions have no application; for the reason that the plaintiff did not own any real estate abutting on the Hunt lot until 1886. The judgment of the district court must be

AFFIRMED.

STATE V. SCHAFFER.

1. **Criminal Law : REASONABLE DOUBT : INSTRUCTIONS.** The court, at the end of an instruction, otherwise unexceptionable, on the question of reasonable doubt, added these words : " If you are then not so satisfied and convinced of the defendant's guilt that you would act upon that conviction in matters of highest importance to yourselves, you should give the defendant the benefit of the doubt, and acquit ; if you are so satisfied, you should convict him." *Held* that in these words there was no error. (*State v. Nash*, 7 Iowa, 347, and *State v. Ostrander*, 18 Iowa, 435, *followed* ; and *State v. Pierce*, 65 Iowa, 85, *distinguished*.)
2. **Keeping House of Ill Fame : INDICTMENT : SURPLUSAGE : PROOF.** The indictment in this case charged defendant with keeping a house of ill fame, to which he permitted persons to resort for purposes of prostitution and lewdness ; also that, at his solicitation and request, prostitution and lewdness were practiced in said house. *Held* that the latter allegation was mere surplusage, being only matter of evidence, which it was not necessary to prove.

The State v. Schaffer.

8. ——— : EVIDENCE TO SUPPORT VERDICT. The evidence justified the jury in finding that defendant's house was frequently resorted to by lewd women, who were there visited by men, but there was no direct evidence of lewd practices on the premises. Neither was there any direct evidence that defendant knew of the purposes of those who frequented his house, and he testified that he knew of no lewd practices there. But the jury were warranted in finding that he knew the character and reputation of the women whom he permitted to frequent the house. *Held* that this court could not set aside the verdict of guilty for want of evidence to support it.
4. Evidence : ERROR IN ADMITTING : CORRECTION BY INSTRUCTION. Error in admitting evidence is cured by an instruction taking it from the consideration of the jury.

Appeal from Wapello District Court.—HON. CHARLES D. LEGGETT, Judge.

FILED, SEPTEMBER 5, 1888.

THE defendant was convicted of the crime of keeping a house of ill fame, and sentenced to a term of imprisonment in the penitentiary, and he appeals.

E. L. Burton, for appellant.

A. J. Baker, Attorney General, for the State.

REED, J.—I. The district court instructed the jury that the defendant would be entitled to an acquittal, unless the evidence established the fact of his guilt to the exclusion of every reasonable doubt; also that, as the evidence relied on to establish the charge was circumstantial, they would not be warranted in finding the defendant guilty, unless the circumstances proven were wholly inconsistent with every other reasonable and probable theory except that of his guilt. The following instruction was also given: "A reasonable doubt is one which fairly and naturally arises in the mind after considering all of the evidence and carefully examining the whole case. If you are then not so satisfied and convinced of

1. CRIMINAL
law: reason-
able doubt:
instructions.

The State v. Schaffer.

defendant's guilt that you would act upon that conviction in matters of the highest importance to yourselves, you should give the defendant the benefit of your doubt, and acquit; if you are so satisfied, you should convict him." Exception was taken to the last two sentences of this instruction. In *State v. Nash*, 7 Iowa, 347, and *State v. Ostrander*, 18 Iowa, 435, however, instructions to the same effect were approved by this court, and the doctrine of the instruction has been the accepted rule on the subject in this state since the latter case was decided. But it was contended that the instruction was disapproved in *State v. Pierce*, 65 Iowa, 85. But the language of that opinion relied on was used merely by way of concession, for the purposes of the case. The effect of what is there said is that, if the true rule is as was contended by counsel, it was sufficiently expressed by the instruction under consideration when all of its language was considered. But we had no intention of overruling the former cases, and, when all of the instructions in the present case are considered, they are quite as favorable to defendant as was the charge in that case.

II. It was charged in the indictment that defendant kept a house of ill fame, to which he permitted persons to resort for purposes of prostitution and lewdness; also that, at his solicitation and request, prostitution and lewdness were practiced in said house. Counsel for defendant requested the district court to instruct the jury that he could not be convicted unless this latter averment was proven, which the court refused to do, but told the jury that the proof would warrant a conviction if it showed that defendant's house was resorted to for the unlawful purposes alleged, with his knowledge and consent. This ruling is clearly correct. The offense consists in keeping a house resorted to for purposes of prostitution and lewdness. Code, sec. 4013. To render the keeper of a house guilty of the offense, he of course must have knowledge of the unlawful purposes of those who resort to it, and must consent to its use for those purposes. If the evil practices are carried on

2. KEEPING
house of ill
fame: indictment:
surplusage: proof.

The State v. Schaffer.

at his solicitation and request, this, of course, would show both knowledge and consent. Proof of such solicitation or request might be a means, then, of establishing one of the facts which the state is required to prove, but they are not an essential ingredient of the crime. The averment of solicitation and request was, as matter of pleading, mere surplusage. If the crime was otherwise established, it was not necessary to prove those facts, simply because they were alleged in the indictment. The case is not within the rule that, where the pleader has averred the facts constituting the offense with particularity, he will be required to prove them as alleged. The averment in question is not of facts constituting the crime, but is the allegation merely of evidence by which a material fact might be proven.

III. It was contended that the verdict is not supported by the evidence. The evidence justified the jury in finding that defendant's house was frequently resorted to by lewd women, who were there visited by men; but there was no direct evidence that the parties were guilty of lewd practices on the premises. That fact can seldom be proven by direct evidence, and the inference drawn by the jury that such practices were there carried on is neither unreasonable nor unnatural, and we would not be warranted in disturbing their finding. Neither was there any direct evidence that defendant knew of the purposes of those who frequented his house, and he testified, in his own behalf, that he had no knowledge of any lewd practices having been carried on there. The jury, however, were warranted in finding that he knew the character and reputation of the women whom he permitted to frequent his house. They probably concluded, notwithstanding his positive denial, that he did know their purposes in going there, and that conclusion is reasonable. The question was largely as to the weight and credit which ought to be given to his testimony. The verdict is not so manifestly against the weight of evidence as to warrant us in interfering.

8. —: evidence
to support
verdict.

IV. A police officer who was examined as a witness

Campbell v. Manderscheid.

testified to having arrested two women at defendant's house, and, against defendant's objection, was permitted to testify that the arrest was made on a charge of prostitution. It may be admitted that this evidence was incompetent. But the court subsequently, by an instruction, excluded it from the consideration of the jury. Defendant could not, therefore, have been prejudiced by its admission, and it affords no ground for the reversal of the judgment.

We have examined the whole record, and find no ground upon which the judgment can be disturbed.

AFFIRMED.

74 708
78 454
78 456

CAMPBELL V. MANDERSCHEID.

1. **Intoxicating Liquors: NUISANCE: ATTORNEY'S FEES: STATUTE RETROACTIVE.** Although this case for the abatement of a liquor nuisance was begun prior to the enactment of the law authorizing attorney's fees to be taxed against defendants in such cases, yet, as it was tried after the enactment and taking effect of that law, attorney's fees were properly taxed, under the doctrine of *Drake v. Jordan*, 78 Iowa, 707.
2. ———: ———: ———: **AMOUNT: REVIEW.** In this case, an attorney's fee of twenty-five dollars was taxed against defendant, and plaintiff, being dissatisfied with the amount, appeals. *Held* that, to justify interference by this court in such matter, a very clear showing of error would be necessary, which is not made in this case.

Appeal from Plymouth District Court.—HON. SCOTT M. LADD, Judge.

FILED, SEPTEMBER 5, 1888.

THIS and five other causes were, by agreement of counsel, submitted together. They all involve the same question, which is the amount of attorney's fees proper to be taxed in certain actions for the abatement of liquor nuisances. The court fixed the fees at twenty-five dollars in each case. Plaintiffs, being dissatisfied with the allowance made, appeal to this court.

Windsor & Cathcart v. Cobb.

Struble, Rishel & Hart, for appellants.

Argo & McDuffie, for appellees.

ROTHROCK, J.—That the plaintiffs are entitled to have attorney's fees taxed in some amount must be conceded, under the rule of *Drake v. Jordan*, 73 Iowa, 707. In this case, as in that, the suits were commenced before the statute authorizing attorney's fees to be taxed in such cases was passed.

The question to be determined is whether the court erred in fixing the amount of the fees. It is claimed that, as these are equitable actions, this appeal is triable anew. But the appeals are not taken from the decrees. They are mere appeals from orders taxing costs. Such orders, it is true, are based upon evidence as to the value of the legal services rendered; and the court, in fixing the amount, is allowed to use its judgment in the matter, in connection with the record made in the cases, and it would require a very strong case to authorize this court to interfere with the amount fixed by the trial court. We see no reason for disturbing the findings of the district court.

AFFIRMED.

WINDSOR & CATHCART V. COBB *et al.*

Appeal: REVIEW OF FORMER OPINION: STARE DECISIS. The correctness of an opinion filed by this court may be reviewed upon a petition for rehearing, but not on a second appeal in the same case.

Appeal from Taylor District Court.—HON. J. W. HARVEY, Judge.

FILED, SEPTEMBER 5, 1888.

THE facts are stated in the opinion.

G. B. Haddock, for appellants.

J. L. Brown and Chas. Thomas, for appellees.

74	709
89	24
74	709
91	659
74	709
92	295
74	709
103	644

Pattersonville Educational Institute v. Coad.

SEEVERS, C. J.—This case was before the court at a former term, and the opinion will be found in 72 Iowa, 692. In supposed obedience to such opinion, the district court caused to be entered a decree; no additional evidence having been offered by either party. The defendants appeal, and insist that the court below misconstrued the opinion of this court. They maintain that the words, “if all the mortgages are paid,” mean and include the Lombard mortgages only, but we are unable to see how the language used can be thus limited. “All the mortgages” must mean all mortgages mentioned in the opinion and which were material to the adjustment of the whole matter in controversy. Counsel insist that if the opinion of this court is thus construed, it is wrong, and the defendant Evans greatly damaged thereby. Into this field of discussion we cannot enter. The argument of counsel, if made in support of a petition for rehearing, would have been entitled to, and would have received, consideration. But the former decision constitutes the law of this case, and cannot be reviewed except as provided by law. The decree of the district court being in conformity with the opinion of this court, it must be

AFFIRMED.

74	710
87	827
74	710
98	96

PATTERSONVILLE EDUCATIONAL INSTITUTE V. COAD.

1. **Appeal: EVIDENCE CERTIFIED BY JUDGE AFTER TERM EXPIRED.** A judge has no authority, after his term of office has expired, to certify to this court the evidence in a case tried before him while in office.
2. ———: **EVIDENCE CERTIFIED BY SUCCESSOR OF TRIAL JUDGE: DEFECTIVE IDENTIFICATION.** Whether the successor in office of the judge who tries a case may certify the evidence for the purposes of an appeal, *quaere*; but, at all events, the certificate so made in this case must be disregarded, because it is not entitled as in any case, and does not purport to be attached to the evidence, nor to identify it in any way.

Appeal from Sioux Circuit Court.—HON. D. D. McCALLUM, Judge.

FILED, SEPTEMBER 5, 1888.

ACTION in equity to enforce the specific performance of a contract by which it is claimed that defendant was bound to execute a promissory note to plaintiff. There was a decree for defendant, and plaintiff appeals.

Struble, Rishel & Hart, for appellant.

Bell & Palmer, for appellee.

ROTHROCK, J.—Appellee insists that appellant cannot have a trial of the cause in this court, because the evidence upon which the trial was had in the court below has not been made of record. It appears that the cause was tried before Hon. D. D. McCallum, judge of the circuit court. The decision of the cause was made on the thirty-first day of December, 1886. The term of said judge expired January 1, 1887. He made the certificate as to the evidence required by section 2742 of the Code on the thirtieth day of April, 1887. It is evident that this certificate must be disregarded. *Cross v. Burlington & S. W. Ry. Co.*, 58 Iowa, 62.

Appellant's abstract contains a certificate made by Hon. Scott M. Ladd, the successor in office of the trial judge. This certificate was made April 30, 1887. Section 2742 of the Code requires that the certificate shall be made by the judge. This would seem to contemplate that the certificate must be made by the judge who tried the case. But, whether this be so or not, the certificate now under consideration is insufficient, in that it is not entitled as in any case, and does not purport to be attached to the evidence, nor to identify it in any way. We do not hold that a judge cannot in any case certify to the evidence in a cause tried by his predecessor in office. It is not necessary to so hold in this case, because, so far as appears, the certificate under consideration may just as properly be held to apply to one case as another. The cause was submitted in the court below

1. APPEAL: evidence certified by judge after term expired.

2. —: evidence certified by successor of trial judge: defective identification.

Miles v. Wikel.

three months before it was decided and taken under advisement. If counsel for appellant had taken the precaution to have the certificate of the trial judge attached to the short-hand notes, and then had the transcript made and properly certified by the short-hand reporter within six months from the date of the decree, this would have been sufficient. *Merrill v. Bowe*, 69 Iowa, 653. A transcript of the short-hand notes was filed, but the certificate thereto is insufficient and defective. Even if it were complete and in due form, it would be no ground for dispensing with the certificate of the judge, because the statute positively requires that the judge shall certify the evidence. We think that the motion to strike out what purports to be the evidence must be sustained and that the decree must be

AFFIRMED.

MILES V. WIKEL.

1. **Verdict: EVIDENCE TO SUPPORT.** In this action (for money loaned) the evidence is considered (see opinion), and, while conflicting, *held* sufficient to support the verdict against defendant.
2. ——— : **GENERAL AND SPECIAL: CONFLICT.** A special verdict that defendant had borrowed a certain sum, and a general verdict for a larger sum, cannot be said to be in conflict, where the difference is the interest on the amount borrowed.
3. ——— : **FAILURE TO ANSWER SPECIAL INTERROGATORY: NO PREJUDICE.** A failure to answer a part of a special interrogatory is no ground for reversal where, from the verdict found, it is clear that the answer, if given, would have been immaterial.
4. **Instructions: NO EVIDENCE TO WARRANT: ERROR WITHOUT PREJUDICE.** Submitting to the jury an issue on which there is no sufficient evidence is no ground for reversal on defendant's appeal, where the jury finds in his favor on that issue.
5. ——— : **STATUTE OF LIMITATIONS: NO ISSUE.** In an action for money loaned, where it was clear that, if any loan was made, it was within five years of the beginning of the action, and there was no issue based on the statute of limitations, no instruction as to the limitation of actions of that kind would have been proper; and especially would it have been improper to instruct that plaintiff could recover only for a loan made "within the five years last past," since time in such cases is calculated from the beginning of the action.

Miles v. Wikel.

Appeal from Harrison District Court.—HON. C. H. LEWIS, Judge.

FILED, SEPTEMBER 5, 1888.

ACTION to recover the amount of a loan alleged to have been made to defendant by plaintiff's intestate, and the value of certain personal property alleged to have belonged to decedent, and to have been converted by defendant to his own use. The case was tried to a jury, and a verdict and judgment rendered for plaintiff. The defendant appeals.

L. R. Bolter & Sons, for appellant.

McMillan & Kindall and *S. H. Cochran*, for appellee.

ROBINSON, J.—C. L. Lockwood, the plaintiff's intestate, died in March, 1884. During the year preceding his death he sold a farm in Nebraska, and it is claimed that he loaned seven hundred dollars of the proceeds to defendant. It is further claimed that defendant took possession of a cow, a hog and certain household goods belonging to decedent, and converted the same to his own use. Evidence was given tending to support the claims of plaintiff. The jury found specially that defendant had borrowed \$444.29 of decedent, and that he was owing him that amount at the time of his death. The jury returned a general verdict in favor of plaintiff for \$537.59. Pending the decision on defendant's motion for a new trial, the plaintiff remitted all claim for judgment in excess of five hundred dollars, and, upon the overruling of the motion, judgment was entered for that amount and costs.

I. It is contended for appellant that the special findings and general verdict are wholly unsupported by the evidence. While the evidence was conflicting, we think there was sufficient to justify the jury in finding that defendant

1. VERDICT: evidence to support.

was indebted in at least the amount of the verdict. It is shown that decedent sold a farm the year before his death, for which he received eight hundred dollars or more, besides the amount of an incumbrance. There is some question as to the person to whom the farm was sold, the defendant claiming to have purchased it; but that is not material. The defendant could have borrowed the amount alleged as readily if he had paid it originally as though it had been paid by another. He admitted to different witnesses that he had borrowed money of decedent; that he was owing him money, and paying interest on it. The proceeds of the sale of the farm are not accounted for unless loaned to defendant as claimed. It is true that the basis adopted by the jury in fixing the amount of the indebtedness is not fully disclosed, nor do we understand why a portion of the amount found due was remitted by the plaintiff. The amount which defendant admitted repeatedly that he had borrowed was about seven hundred dollars. There was some evidence as to claims held by defendant against decedent, and it may be that these were deducted by the jury. But if there was an error in the amount of the verdict or of the judgment, the error was in favor of defendant, and cannot be corrected on this appeal.

II. It is claimed that there is conflict between the special findings and general verdict. It is alleged that

2. —: general
and special :
conflict. Lockwood died March 1, 1884, and shown that he died in that month. The verdict was returned September 9, 1887, or three years and six months after the ninth day of March, 1884. The amount of the special finding was \$444.29, and of the general verdict \$537.59. The difference, \$93.30, is just the interest on the amount of the special finding for the time last named, at six per cent. It is therefore evident that the jury allowed nothing excepting for money loaned, and that the finding and verdict are in entire harmony.

III. Complaint is made that the jury did not answer one part of a special interrogatory which asked

Miles v. Wikel.

3. —: failure
to answer
special inter-
rogatory: no
prejudice.

the time of the making of the loan. One of the special findings had fixed the date of the indebtedness at the time of the sale of the Nebraska farm. But the answer in question was not material, for the reason that no interest on the loan was allowed for time prior to March 9, 1884, and defendant could not have been prejudiced by the failure of the jury to fix the date of the loan.

IV. It is claimed that there was not sufficient evidence as to the alleged conversion of property in controversy to justify the court in submitting the question of conversion to the jury. There was some evidence on that question, but whether it was sufficient or not is immaterial, for the reason that the record shows that nothing was allowed to plaintiff on account of it. Hence the defendant could not have been prejudiced by the action of which he complains.

4. INSTRUCTIONS:
no evidence
to warrant:
error without
prejudice.

V. Appellant complains of the failure of the court to instruct the jury that before they could find for the plaintiff they must find that the defendant had borrowed of decedent a sum of money "within the five years last past."

5. —: statute
of limitations:
no issue.

Since the time was not limited to five years from the commencement of the action, the instruction should not have been given in any event. But the question of the statute of limitations was not made an issue by the pleadings, and there was no controversy as to the fact that, if defendant had borrowed money of decedent, the borrowing was done during the latter part of 1883. We discover nothing to the prejudice of appellant in any of the matters of which he complains.

AFFIRMED.

74	716
100	133
74	716
118	34

VAN WAGENEN *et al.* v. SUPERVISORS OF LYON COUNTY.

1. **Taxation: JURISDICTION OF ASSESSOR.** An assessor in this state has the power and jurisdiction to determine that shares of stock in a bank in another state, owned by residents in his district, are assessable by him, so that the assessment, if erroneous, will not be void.
2. ———: **ERRONEOUS ASSESSMENT: UNWARRANTED CORRECTION BY SUPERVISORS: CERTIORARI BY TAXPAYER.** Where a taxpayer was assessed at the place of his residence with shares in a bank located in another state, and, without complaining to the city or township board of equalization, he applied to the county supervisors for an abatement of the tax, and they granted the relief asked, *held* that they acted without jurisdiction, and that a taxpayer of the county was entitled to have their action reviewed and set aside on *certiorari*. (See statutes and cases cited in opinion.)

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, SEPTEMBER 5, 1888.

THE facts are stated in the opinion.

A. Van Wagenen and J. M. Parsons, for appellants.

Joy, Hudson & Joy, for appellee.

SEEVERS, C. J.—In 1886 Miller and Thompson, who reside in Lyon county, were duly assessed for the purpose of taxation with certain bank stock owned by them in banks incorporated under the laws of Minnesota, and situated in that state. In January, 1887, the board of supervisors, by a resolution duly passed, rebated the tax so assessed. The plaintiffs commenced this *certiorari* proceeding for the purpose of annulling the act of the board.

I. The first question to be determined, it seems to us, is whether the assessment was void or merely erroneous. Miller and Thompson, as we have seen, were

Van Wagenen v. Supervisors of Lyon County.

residents of Lyon county, and were liable to be assessed there with all the personal property owned by them. The assessing officer had the power and jurisdiction to determine that the bank shares were assessable in that county. He may have erred, but clearly, we think, the assessment was not void. In principle this identical question was determined adversely to the defendant in *Harris v. Fremont County*, 63 Iowa, 639, for it is immaterial whether the property assessed is situated in another county or state, in so far as the question of the power and jurisdiction of the assessment and levy of the tax is concerned.

II. The next question is in what manner such an erroneous assessment can be corrected. The uniform ruling in such a case is that the aggrieved party must apply to the city or township board of equalization for such correction. *Macklot v. City of Davenport*, 17 Iowa, 379, and other cases following it. Miller and Thompson did not adopt this remedy, but, long after the time within which they were required to appear before the proper board of equalization, they applied to the board of supervisors for relief. The question is pertinent whether the board had the power and jurisdiction to grant the relief it did. That the board of supervisors also constitutes a board of equalization is undoubtedly true. Code, sec. 832. For this purpose the board is required to perform duties incumbent on it at a certain time which had elapsed long prior to the time the resolution in question was passed. Besides this, their powers, when so meeting, are confined to equalizing assessments between the several townships, cities and incorporated towns in the county, and such board has no power to "add property not assessed to the assessment roll or tax-list, or to strike therefrom any duly assessed." *Royce v. Jenney*, 50 Iowa, 676. Counsel for the appellee, however, claim that the requisite power is found in section 870 of the Code, which provides: "The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion of a tax found to have been erroneously or illegally exacted and paid."

Van Wagenen v. Supervisors of Lyon County.

Strictly speaking, as this tax has never been exacted or paid, this statute has no application. But counsel say that, assuming that the bank shares are not assessable, it is clearly unnecessary to pay the money into the treasury and then apply to and obtain an order from the board on the treasurer to repay it. Therefore the error of the board, conceding it to have been an error, was in no respect prejudicial. This argument is specious, but not sound, for the reason that it assumes that a taxpayer who is erroneously assessed must pay the tax and then apply to the board for an order on the treasurer to refund the same, and, if the board refuses, he can maintain an action to recover the tax, although he fails to make application to the proper board of equalization to correct the erroneous assessment. If the taxpayer is erroneously assessed, he must pursue the remedies provided by law to correct the error, and the statute in question simply means that when the taxes have been exacted or paid, although the taxpayer has availed himself of all the remedies provided by law without obtaining the relief, the board of supervisors may direct such taxes to be refunded. If a person pays taxes without availing himself of the remedy provided by law, it cannot be regarded as an illegal exaction, provided the power and jurisdiction existed to make the assessment and levy. We are not required to determine what the rule would be if the assessment was void. Counsel cite and rely on *Callanan v. Madison County*, 45 Iowa, 561, but the only question determined in that case was whether the action was barred by the statute of limitations. As the board of supervisors did not have the power and jurisdiction to make the abatement it did, it follows that the action of the board may be reviewed and corrected by *certiorari* at the instance of a taxpayer. *Collins v. Davis*, 57 Iowa, 256. The judgment of the district court is

REVERSED.

LAMB *et al.* v. DAVIS *et al.*

1. **Tax Sale and Deed : TO AGENT OF OWNER : TITLE OF BONA-FIDE GRANTEE.** Although an agent cannot acquire a valid tax title to the lands of his principal, yet, where he thus acquires the legal title, a purchaser from him in good faith and for value will be protected against the equities of the principal.
2. ——— : ——— : **WHO IS AGENT.** Where a friend of the non-resident owner of land volunteered to pay the taxes with his own money, expecting to be reimbursed, but the owner neglected to reimburse him when requested so to do, *held* that he was in no sense the agent of the owner for the payment of the taxes, and that he had the same right as any other person to bid in the land for subsequent unpaid taxes, and to take a treasurer's deed therefor, and that he was not liable to account to the former owner for the land or its proceeds.
3. ——— : **SALE TO ONE NOT PRESENT : TITLE OF SUBSEQUENT GRANTEE.** Where the purchaser of land at tax sale was not present at the sale either in person or by agent, but the land was stricken off to him in pursuance of a secret arrangement between himself and the treasurer, but without fraud, *held* that the sale was not void, but that, on account of the irregularity, he might have been divested of all interest in the property by proper proceedings while he held the title ; but that he was not liable as a trustee of the land or of the proceeds of the sale of it ; and that a good-faith purchaser for value from him could not be disturbed in his title on account thereof.

Appeal from Ringgold District Court.—HON. R. C. HENRY, Judge.

FILED, SEPTEMBER 5, 1888.

ACTION in equity. The prayer of the petition is in the alternative—(1) that the title to certain real estate be quieted in plaintiffs against a tax deed executed by the county treasurer to defendant George Sweney, and that the conveyance under him, through which defendants claim title, be canceled ; or (2) if that relief cannot

Lamb v. Davis.

be granted, that Sweney be adjudged to hold the proceeds derived by him from the sale of the property in trust for plaintiffs, and that he be required to pay over the same to them. The district court, upon a hearing on the merits, dismissed the petition. Plaintiffs appeal.

Laughlin & Campbell and *J. W. Brockett*, for appellants.

S. L. Glasgow and *F. F. Leathers*, for appellees.

REED, J.—Plaintiff A. H. Lamb and the mother of the other plaintiffs (who is now deceased) became the owners of the property in 1855. It was purchased by their father from Hugh C. Hodge, who at his request conveyed it to them, they at the time being minors.

Sweney had formerly owned the land, and had sold it to Hodge. Soon after the purchase from Hodge, plaintiffs' father removed with his family from this state to Kentucky, where he afterwards died. He had failed in business in this state, and Sweney was the assignee, under the insolvent laws, of the partnership of which he was a member. For a number of years after the purchase from Hodge, Sweney paid the taxes on the land. In 1870 the treasurer of the county executed to him a tax deed of the land, which is in regular form, and which recites a sale in October, 1863, for the delinquent taxes of 1861 and 1862. In 1879, Sweney sold and conveyed the land to A. G. Davis for the consideration of sixteen hundred dollars, the conveyance being by warranty deed, and he subsequently conveyed it by a like conveyance to defendant E. C. Davis. The grounds alleged by plaintiffs for relief against the tax deed and subsequent conveyances are (1) that, at the time of the pretended sale of the land for delinquent taxes, Sweney was their agent, charged with the duty of paying the taxes thereon, and of protecting it from tax sale, and that consequently he could not, as against them, acquire title to it under a sale of that kind; and (2) that

1. Tax sale and deed: to agent of owner: title of bona-fide grantee.

Lamb v. Davis.

Sweney was not present either in person or by agent at the alleged sale, but that the lands were stricken off to him by the treasurer in pursuance of a secret arrangement theretofore entered into between him and Sweney.

If each of these allegations were proven, plaintiffs would not, in view of the other facts of the case, be entitled to relief as against defendant Davis. His grantor is shown to have been a purchaser of the property for value, and without notice of the alleged irregularities or frauds in the sale, and he and his grantees will be protected against the equities of the former owners growing out of the same. *Van Shaack v. Robbins*, 36 Iowa, 201; *Sibley v. Bullis*, 40 Iowa, 429; *Martin v. Ragsdale*, 49 Iowa, 589.

We will next examine the question whether plaintiffs are entitled to the relief demanded against Sweney.

The undisputed evidence is that the payments of taxes made by him after the purchase of the land from Hodge were made with his own money. He had no funds in his hands belonging either to plaintiffs or their father. The only evidence on the subject is his testimony, and that is to the effect that he was never requested by any of the parties to give any attention to the property; but, being an acquaintance and friend of the father, he voluntarily assumed to make the payments, expecting to be reimbursed therefor, and that he afterwards wrote to the father informing him that he had paid the taxes, and requesting him to remit the amount to him, which he neglected to do, and that he thereupon declined to make any further advances, and permitted the taxes to become delinquent. Very clearly, this voluntary and friendly act on his part did not create a fiduciary relation between him and them, nor did it impose upon him the duty of looking after or protecting their interest. His act of permitting the property to go to sale was neither a breach of good faith nor a violation of duty, and he was at liberty, like any other citizen, to purchase it, and he can no more be charged as a trustee of the property

 Everling v. Holcomb.

than could any other person who, while occupying an indifferent position towards the owners, had become the purchaser. The evidence as to the manner of the sale is conflicting. But if it be conceded that the facts are as claimed by plaintiffs, they would not be entitled to the relief demanded. It would follow only in that case that the sale was irregular, and might have been avoided and the land recovered, by a proper and timely action for that purpose. It would not follow that the purchaser under such sale can be charged as a trustee either of the property or the proceeds after a sale. He might have been divested of all interest in the property if an action had been instituted to set the sale aside while he held under it; but that is the extent of his liability. The matter alleged, it will be remembered, constituted a mere irregularity, and there is no pretense that there was any actual fraud in the sale.

AFFIRMED.

| 74 722 |
| 91 410 |

EVERLING V. HOLCOMB.

1. **Clerk of Court: FILING PAPERS WITH: WHAT SUFFICIENT.** Section 200 of the Code, requiring the clerk, upon the filing of any paper in a cause, to make a memorandum thereof in the appearance docket, is mandatory so far as it relates to pleadings, but only directory so far as it relates to other papers; and in this case, *held* that the stenographer's notes of the evidence were to be considered as filed when they were delivered to the clerk to be kept in his office, though they were not marked "Filed," and no memorandum of the filing was made in the appearance docket. (Compare *State v. Briggs*, 68 Iowa, 416.)
2. **Bill of Exceptions: REFERENCE TO SHORT-HAND NOTES OF EVIDENCE.** Under section 8777 of the Code, the short-hand notes of the evidence, when filed with the clerk, may be referred to in a bill of exceptions, and the clerk may insert the evidence from the extended transcript made and filed by the reporter after the filing of the bill of exceptions.

 Everling v. Holcomb.

3. **Former Adjudication: PARTIES ONLY BOUND: INSTANCE: VENDOR AND VENDEE.** Defendant sold land to plaintiff on which there was an unsatisfied mortgage of record, but defendant represented that the mortgage was a forgery, and no lien on the land. Afterwards, in an action to which plaintiff was a party, the mortgage was foreclosed, and plaintiff brought this action for damages on account of the alleged misrepresentation. Defendant, in answer, averred that the mortgage was a forgery, and that if plaintiff had made diligent defense it would have been so adjudged. *Held* that, as defendant was not a party to the foreclosure suit, the judgment in that case did not preclude him from setting up the fraudulent character of the mortgage.
4. **Vendor and Vendee: FRAUDULENT MORTGAGE: DUTY TO RESIST.** Where a vendor quit-claims land, representing that a recorded mortgage thereon is a forgery, and it is a forgery, and the vendee, in a subsequent action to foreclose the mortgage, neglects to plead the forgery, and thus allows his title to be impaired, he cannot recover of his vendor.
5. ———: **INDUCEMENT: MISREPRESENTATIONS OF AGENT.** Representations made by an agent of the vendor after the sale has been consummated, and when he is no longer acting for the vendor in the matter, are no ground of action against the vendor.
6. ———: **FRAUD: CONCEALMENT OF MORTGAGE: EVIDENCE.** In an action for fraud in the sale of real estate, where the only question was whether defendant had concealed the fact that the land was mortgaged, and had represented that he had a perfect title, *held* that evidence that he had purchased the land only a short time before for much less than its market value was not relevant.
7. ———: ———: ———: **MEASURE OF DAMAGES.** Where a vendor fraudulently conceals a mortgage on land conveyed, the vendee's measure of damages is not the market value of the land, but only the amount necessary to redeem from the mortgage, together with costs, where he has properly allowed it to be foreclosed.

Appeal from Union District Court.—HON. JOHN W. HARVEY, Judge.

FILED, SEPTEMBER 5, 1888.

ACTION for the recovery of damages on account of an alleged fraud in the sale of real estate. Verdict and judgment for plaintiff. Defendant appeals.

Maxwell & Leonard, for appellant.

Everling v. Holcomb.

McDill & Sullivan, for appellee.

REED, J.—I. Upon the overruling of the motion for a new trial the district court granted defendant thirty days within which to settle and file his bill of exceptions. Within that time he filed a “skeleton bill,” properly signed by the judge. The evidence was taken down by the stenographer, who at the close of the trial deposited his short-hand notes with the clerk, but the latter neither indorsed them “Filed,” nor entered any memorandum of their filing in the appearance docket. They remained in the office of the clerk for a time, when they were sent to the reporter, who made an extended transcript of them, which was returned to the clerk and properly filed in his office. But that was not done until after the expiration of the thirty days allowed for filing the bill of exceptions, nor was the transcript certified by the judge. Appellee filed in this court a motion to strike from the transcript the bill of exceptions on the ground that it did not preserve the evidence; also to strike the evidence from the abstract on the ground that it had not been properly preserved or made part of the record. The position of counsel is that, unless either the short-hand notes of the evidence or the extended transcript was filed within the time allowed for settling the bill of exceptions, it did not become part of the record of the case, and that the mere depositing of the notes with the clerk did not constitute a filing within the meaning of the statute. It is provided by section 3777 of the Code that the short-hand notes “shall be filed in the office of the clerk of the court, and become part of the record in the case.” Ordinarily a paper is filed within the meaning of the law when it is delivered to the proper officer to be kept on file in his office. *State v. Briggs*, 68 Iowa, 416. That is what is done in the present case with the original notes. But it was contended that under section 200 of the Code no paper can be regarded as filed until a memorandum thereof is entered by the clerk in

1. CLERK of
court : filing
papers with :
what suffi-
cient.

 Everling v. Holcomb.

the appearance docket. The section is as follows: "The clerk shall immediately upon the filing thereof make in the appearance docket a memorandum of the date of the filing of all petitions, demurrers, answers, motions, or papers of any other description in the cause; and no pleading of any description shall be considered as filed in the cause, or be taken from the clerk's office, until the said memorandum is made." We have held that as to all pleadings in a cause this provision is mandatory, and that they could not be regarded as filed until the proper memorandum was made in the appearance docket. *Padden v. Moore*, 58 Iowa, 703; *Nickson v. Blair*, 59 Iowa, 531. But it is clear from the language of the section that the mandatory provision applies only to papers of that character. It may be true that the clerk was required, under the first clause of the section, to enter a memorandum of the filing of the notes in the appearance docket, but, by the express language of the latter clause, it is pleadings alone which shall not be regarded as filed until such memorandum has been made. It is that clause which gives the mandatory character to the section; and the expression as to the particular papers to which the mandate applies necessarily excludes all others from its operation. As to other papers the section is directory. We think, therefore, that the notes were filed within the meaning of the law. By the provisions of section 3777 they may, when filed, be referred to by the bill of exceptions, and it was

2. BILL of ex-
ceptions:
reference to
short-hand
notes of evi-
dence. competent for the clerk to embody the evidence after the extended transcript was made by the reporter in the transcript of the case. It is sufficient to say, with reference to the cases cited by counsel, that none of them determine the question raised by the motion to strike. The motion will therefore be overruled.

II. The transaction out of which the case arose was an exchange of property. Defendant deeded to plaintiff a lot in the city of Creston for a farm. The farm was incumbered by a mortgage, which defendant assumed. He also paid cash to the amount of five hundred

3. FORMER
adjudication:
parties only
bound: in-
stance: vendor
and vendee.

Everling v. Holcomb.

dollars in the trade. It was agreed—that the value of the farm was twenty-five hundred dollars, and that of the lots one thousand dollars. At the time of the transaction there was on record in the county an instrument purporting to be a mortgage on the lot, executed by a former owner, securing an indebtedness of eight hundred dollars. The parties each conveyed by quit-claim. The substance of plaintiff's claim is that he is illiterate, and that he did not understand the character or effect of the conveyances, and that defendant fraudulently concealed from him the fact that the conveyance which he was giving him was but a quit-claim; also that he concealed from him during the negotiations the fact of the existence of the mortgage, although he knew of its existence, and assured him that his title to the lot was perfect. Defendant, in his answer, denied that he had concealed the existence of the mortgage, and alleged that he had informed him fully as to that fact, but that the former owner, whose deed it purported to be, claimed that it was a forgery, and that a suit had been instituted for its foreclosure, but that the same had been dismissed when the defense of forgery was interposed. The evidence showed that a suit had been instituted after the trade, to which plaintiff was a party, in which a judgment of foreclosure was entered, under which the lot had been sold, and a deed had been executed to the purchaser.

On plaintiff's motion the district court struck out of the answer the following allegation: "Defendant expressly avers that, notwithstanding said decree (the judgment of foreclosure), he yet believes and alleges the truth to be that said mortgage was and is a forgery, and that, if plaintiff had made proper and diligent defense against the same, it would have been so adjudged and decreed." The ground of the motion to strike was that the averment was not applicable to any issue presented, and that the matters alleged, if true, could not be proven, the same being incompetent. It was contended on the argument that the allegation was not sufficient to raise the issue that plaintiff had a sufficient and valid defense against the mortgage which he had negligently

Everling v. Holcomb.

failed to interpose or establish on the trial. But it is manifest that that question was not ruled upon by the district court, nor was it raised by the motion. The question raised is as to the competency of the matter pleaded as a defense; and the ruling, in effect, was that the judgment in the foreclosure proceeding was an adjudication of the question of the validity of the mortgage, which was binding on the parties, and that it could not be inquired into in this action. In our opinion, the ruling is erroneous. The judgment is conclusive upon the parties to the action, and, as between them, determines that the mortgage is valid, and its enforcement can no longer be resisted or questioned by either of them. But defendant was not a party to the action, and he had no interest which demanded protection, or which would have given him any standing in court to resist the enforcement of the mortgage. He had parted with an interest in the property, and he is not now seeking to question either the

judgment or any right acquired under it; but his claim is that plaintiff had a defense which, if he had interposed, would have prevented the very injury for which he is now seeking redress; and he is not estopped by the judgment from asserting that defense. Suppose that plaintiff, with knowledge that the mortgage was a forgery, had consented to the foreclosure, it would hardly be contended in that case that defendant could not show that fact in defense against the claim that is now made against him. But wherein would the situation of the parties differ in that case from this? The judgment would as conclusively determine the validity of the mortgage as does the one in question. The act of consenting to the judgment would be a fraud by plaintiff which would preclude any recovery by him for the injury which resulted from it. In this case, under the averment in question, the injury was caused by his negligence, which as certainly precludes a recovery.

III. When the parties were about to execute the conveyance there was some inquiry by plaintiff as to the

4. Vendor and vendee: fraudulent mortgage: duty to resist.

 Everling v. Holcomb.

5. —: inducement: misrepresentations of agent. state of the title to the lot. The parties were then in the office of the conveyancer who drew the deeds, and defendant referred plaintiff to him for information on the subject. There was evidence tending to prove that the conveyancer then declared in presence of both parties that defendant held the property by perfect title. He was also employed by defendant to prepare or procure an abstract of the title, which he delivered to plaintiff several days after the deeds were executed and delivered. Against defendant's objection, plaintiff was permitted to introduce evidence tending to prove that when he delivered the abstract of title he made substantially the same statement. There are two grounds upon which the evidence should have been excluded: (1) The trade had been fully consummated, and the alleged statement could not have operated as an inducement to it; and (2) the conveyancer was not at that time acting for defendant in the matter to which it related.

6. —: fraud: concealment of mortgage: evidence. IV. Against defendant's objection, plaintiff was allowed to prove that defendant had purchased the lot but a short time before the transaction, and had paid but four hundred and fifty dollars for it. This evidence was admitted on the theory that it had some tendency to prove the allegation of fraud. If there had been any issue as to whether defendant knew of the existence of the mortgage, the fact that he had been able to purchase the property for much less than its market value, which was shown to be one thousand dollars, might have had some tendency to show that he knew of the incumbrance. But there was no such issue. It was expressly admitted in the answer that he did know it. The only question in dispute was whether he had concealed the fact of the mortgage, and had represented that he held by a perfect title. If these facts were proven, plaintiff was entitled to recover. But the evidence in question had no tendency to prove them. The only effect it could have would be to confuse and mislead the jury as to the real

Everling v. Holcomb.

question they were to determine, and it should have been excluded.

V. The district court instructed that, if plaintiff was entitled to recover, the measure of his damages was the market value of the lot. If no part of the damages could have been prevented by redeeming from the mortgage, that would be the true measure of recovery; but, if anything could have been saved by redeeming, plaintiff can recover only such sum as would have been required to make the redemption. The reason of this is apparent. The wrong imposed upon him, according to his petition, consisted in the conveyance of the property to him in its incumbered condition, while he paid its full value. The incumbrance was the cause of the damage, and if, as the necessary consequence of the incumbrance, he lost the property, which would be the case if the debt equaled or exceeded the value of the property, that value would measure the damages resulting from the wrong. But if the incumbrance was less than the value, its amount was the measure of the injury; for in that case he acquired something of value by the conveyance, viz., the difference between the value of the property and the amount of the incumbrance. But while the evidence shows the amount of the principal of the mortgage debt, it does not show either the rate of interest or the cost of the foreclosure proceeding, and we cannot determine upon which theory plaintiff's damages should be estimated. On another trial the question will doubtless be met by the proof. As there was a question as to the validity of the mortgage, plaintiff could not with safety redeem until that question was determined. The amount of the mortgage debt and costs, as determined by the judgment, will afford the *data* for determining the question of the amount of the damages.

REVERSED.

SUPPLEMENT.

[The following opinions were retained on petitions for rehearing, and did not come into my hands in time for insertion in their chronological order.—REPORTER.]

PLUMMER *et al.* v. PEOPLE'S NATIONAL BANK OF INDEPENDENCE.

Appeal : ABSTRACT MUST SHOW THAT APPEAL WAS TAKEN. Where the abstract does not show that an appeal was taken, this court has no jurisdiction, except to dismiss the case, even though the appellee appears and raises no question of jurisdiction ; for appearance does not confer jurisdiction upon an appellate court, and it is the duty of the court of its own motion to see that the case is one of which it appears to have jurisdiction.

Appeal from Buchanan District Court.

FILED, JUNE 10, 1887.

THIS action was brought to obtain possession of a policy of life insurance. The defendant Edgar Holmes intervened. There was a trial to the court without a jury, and judgment was rendered for the intervenor. The plaintiff appeals.

John J. Ney, for appellant.

Woodward & Cook, for appellee.

74	731
84	402

74	731
85	736

74	731
88	313

74	731
1134	116

74	731
135	593

Raben v. The Central Iowa Ry. Co.

ADAMS, C. J.—This court cannot take jurisdiction of a case unless our jurisdiction appears affirmatively from the record. Where cases are submitted upon an abstract, we assume that the abstract shows the whole record, so far as it is material. If the abstract does not show that we have jurisdiction, we can do nothing but dismiss the case. The abstract before us does not show that an appeal was taken. This it should show. Rule of Court, 98. We have no jurisdiction of the case except upon appeal. It is true that the appellee appears; but appearance does not confer jurisdiction upon an appellate court. In the absence of an appeal, the appellate court lacks more than jurisdiction of the person of the appellee. It is true, also, that the appellee in this case does not raise the question of a want of jurisdiction; but a court should see to it of its own motion that the case is one of which it appears to have jurisdiction. We think that the appeal must be

DISMISSED.

RABEN V. THE CENTRAL IOWA RAILWAY COMPANY.

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|-----|-----|
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| 87 | 466 |
| 74 | 732 |
| 100 | 360 |
| 74 | 732 |
| 136 | 20 |
| 74 | 732 |
| 139 | 192 |
1. **Railroads : INJURY TO PASSENGER ALIGHTING FROM MOVING TRAIN : CONTRIBUTORY NEGLIGENCE : QUESTION FOR JURY.** It cannot be said, as matter of law, independently of the statute forbidding the act, that it would be, under all circumstances, an act of negligence for a passenger to attempt to alight from a moving train; but the question is ordinarily one of fact, to be determined by the jury from all the circumstances of the case. (See opinion for cases cited.)
 2. ——— : ——— : **WHETHER CRIMINAL ACT : PLEADING AND EVIDENCE.** Section two, chapter 148, Laws of 1876, making it a misdemeanor to get off or on a moving railroad car, does not forbid the act when done with the consent of the conductor; and where plaintiff alleged that she was injured, without any negligence on her part, while alighting from defendant's moving car, *held* that the allegation of care on her part was sufficient to entitle her to prove that she so alighted with the conductor's consent, and that a motion in arrest of judgment, based on the insufficiency of the petition in that respect, was properly overruled.

Raben v. The Central Iowa Ry. Co.

3. ——— : ——— : ——— : BURDEN OF PROOF. Plaintiff seeks to recover for an injury sustained by her while alighting, as a passenger, from defendant's moving train. *Held* that, if her act was a misdemeanor under section two, chapter 148, Laws 1876, she could not recover ; and that, in order to recover, she had the burden to prove that she so alighted with the consent of the conductor, thus showing that her act was not forbidden by said section ; but *held*, also, that such consent might be inferred by the jury from the conduct of the conductor at the time. But since there was no direct evidence of the conductor's consent, and the question whether such consent might be inferred from his conduct was not submitted to the jury, *held* that a verdict for the plaintiff could not be sustained.
4. ——— : DUTY TOWARD PASSENGERS ALIGHTING FROM CARS. It is the duty of a railroad company to provide suitable and safe means for entering and alighting from its trains ; but having done this, and having stopped its train in proper position and for a reasonable time to enable passengers to avail themselves of those means in entering and alighting, it is not bound to render them personal assistance, nor to hold the train until those in charge of it see that the passengers have in fact alighted. (*Allender v. Chicago, R. I. & P. Ry. Co.*, 37 Iowa, 268 ; s. c., 43 Iowa, 276, *distinguished*.)
5. **Personal Injury : DAMAGES : PERMANENCY OF INJURY : INSTRUCTION.** In an action for a personal injury, where there was no evidence that it would be permanent, but that the plaintiff would suffer future pain and inconvenience from it, the court instructed the jury that if they found for plaintiff, and that "her injuries were permanent, they should consider such inconvenience in getting about and pain as they should find reasonably certain to result therefrom in the future, and award her such sum as damages as will reasonably and fairly compensate her therefor." *Held* that the instruction, fairly considered, was not open to the objection that it submitted the question whether the injury was permanent, on which there was no evidence ; and that it was otherwise correct.

Appeal from Keokuk Circuit Court.

FILED, OCTOBER 24, 1887.

THIS is an action for the recovery of damages for a personal injury sustained by plaintiff, as is alleged, while alighting from a passenger train on defendant's railway. The cause was tried to a jury, and there was a verdict for plaintiff for three thousand dollars, Defendant filed a motion in arrest of judgment, also a

Raben v. The Central Iowa Ry. Co.

motion for a new trial. The circuit court overruled both of these motions, and entered judgment on the verdict. Defendant appeals.

Blair & Daly and Geo. D. Wooden, for appellant.

Sampson & Brown, for appellee.

REED, J.—I. The material allegations of plaintiff's petition are that defendant was engaged in operating a line of railroad on which it ran passenger trains, and carried passengers for hire. That plaintiff entered one of its trains as a passenger at Brighton, having purchased a ticket at that station to Clay, another station on defendant's line, and was accompanied by her two young children. That the conductor took up her ticket and knew she was a passenger for Clay. That when the train arrived at Clay she immediately started to leave it, but that the conductor, in violation of defendant's duty to her to permit the train to remain standing at the platform a sufficient length of time to enable her to alight from it with safety, caused it to be started forward before she had time to alight from it. That her children were taken from the train about the time it was started forward, and that she, believing that the speed of the train was not such but that she could with safety jump from the second step, and desiring not to be carried away from her children, did jump to the platform, but by the motion of the train she was thrown down upon the platform, and seriously and permanently injured. It is also alleged that the conductor did not assist her to alight from the train, or inform her that it would be dangerous for her to attempt to alight while it was in motion. Also that she was not herself guilty of any negligence which contributed in any manner to the injury.

The ground of the motion in arrest of judgment is that, upon the facts stated in the petition, plaintiff is not entitled to recover. The positions urged by counsel for

1. RAILROADS :
injury to pas-
senger alight-
ing from mov-
ing train :
contributory
negligence :
question for
jury.

Raben v. The Central Iowa Ry. Co.

appellant are: (1) That, independently of any statutory provisions on the subject, the act of alighting from a moving train is negligent, and the passenger who attempts to do the act, and is injured in consequence thereof, can have no remedy for the injury against the company; and (2) as the act is forbidden, and is punishable as a crime by express statute, the party sustaining an injury while committing it cannot recover damages for the injury.

With reference to the first position we deem it sufficient to say that it cannot be said, as matter of law, independently of the statute, that it would be under all circumstances an act of negligence for a passenger to attempt to alight from a moving train. But the question is ordinarily one of fact, to be determined by the jury from all the circumstances of the transaction. It is true, a case might arise in which it would be the duty of the court to determine the question as matter of law. This would be true if there were no disputed facts, and but one conclusion could fairly be drawn from the facts established. But if the facts are in dispute, or if different conclusions might fairly be reached by different minds from the facts established, the question is for the jury. *Whitsett v. Chicago, R. I. & P. Ry. Co.*, 67 Iowa, 150. By the allegations of the petition all negligence on the part of the plaintiff was denied, and under them she was entitled to prove, if she could, that the injury to her was not reasonably to be apprehended from the act. On the question whether the act of alighting from a moving train is negligence *per se*, see *Nichols v. Dubuque & D. Ry. Co.*, 68 Iowa, 732; *Lindsey v. Chicago, R. I. & P. Ry. Co.*, 64 Iowa, 410; *Vimont v. Chicago & N. W. Ry. Co.*, 71 Iowa, 58.

The statute relied on in support of the second position urged is section two, chapter 148, Laws of the Sixteenth General Assembly, which is as follows: "If any person not employed thereon, or not an officer of the law in the discharge of his duty, without the consent of

2. — : — :
whether
criminal act :
pleading and
evidence.

Raben v. The Central Iowa Ry. Co.

the person having the same in charge, shall get upon or off any locomotive engine or car of any railroad company while said engine or car is in motion * * * he shall be guilty of a misdemeanor, and be punished by fine not exceeding one hundred dollars, or be imprisoned not exceeding thirty days." It is insisted that the facts alleged in the petition show that plaintiff's act in jumping from the train was in violation of this statute. It is to be observed, however, that the statute does not forbid the doing of the act under all circumstances. If plaintiff had the consent of the conductor to alight from the train while it was in motion, she did not incur the penalty imposed by it by doing the act. If she cannot recover because of the statute, it is because she acted in violation of its provisions. Her act was negligent, because unlawful. But she averred in her petition that she was not guilty of any negligence contributing to her injury. We think she was entitled to prove that she did the act with the consent of the conductor. No other averment was necessary to entitle her to prove that fact. The petition is therefore sufficient, and the motion in arrest of judgment was properly overruled.

II. There was evidence given on the trial which tended to prove that the circumstances of the accident were substantially as charged in the petition. There was no direct evidence, however, that the conductor, who was in charge of the train, consented that plaintiff might alight while it was in motion. Neither was it shown that he knew when he started the train that plaintiff had not yet alighted from it. Nor was the question whether his consent might be inferred from his conduct at the time submitted to the jury. But the case appears to have been tried by the plaintiff upon the theory that the question whether she acted upon such consent in jumping from the train was not material.

One of the grounds of the motion for a new trial is that the verdict is not sustained by the evidence. The case, then, presents the question whether a person who has sustained an injury while alighting from a moving

8. —:—
burden
of proof.

Raben v. The Central Iowa Ry. Co.

railway train can maintain an action therefor without proof that he was an employe upon the train, a public officer in the performance of his duty, or that he did the act with the consent of the person in charge of the train, or some officer of the railway company. And we deem it proper to say, in this connection, that, while the question was probably involved in some of the cases cited above, in which we had occasion to consider whether the act, as matter of law, was negligent, in none of them was the point made that it amounted to a violation of the statute quoted. Nor was our attention directed to that statute in our consideration of the cases; so that none of the cases can be regarded as determining the question. The object of the legislature in enacting the statute undoubtedly was to prevent the injuries which were likely to result from the doing of the forbidden acts, and the language made use of leaves no room for construction. All persons, except those belonging to the three excepted classes, are forbidden, under the penalty prescribed, to do the acts. Unless plaintiff belonged to one of the excepted classes, then, her act was unlawful and criminal. And it makes no difference that she was impelled to do the act by the fear of being carried away from her children, or that she had reason to believe that she could do it with safety. Excuses equally good, perhaps, could be given in most of the cases where passengers are tempted to take risks of doing similar acts. If her act was unlawful and criminal, clearly she cannot recover, for her injury was the direct consequence of the act, and the law will not afford a party a remedy for an injury sustained by him as the consequence of his own act, when it had forbidden him in advance to do that act. The burden was on plaintiff to prove that the circumstances of the occurrence were such that she was entitled to recover for the injury she sustained, and the question of her right to recover depends upon whether her own act was lawful. It follows necessarily that she is not entitled to recover without proof that she was acting lawfully at the time. But it is insisted that the

Raben v. The Central Iowa Ry. Co.

consent of the conductor should be inferred from his conduct at the time. It is true, doubtless, that consent may be shown by actions as well as by express words. It may be inferred from the conduct of the party. But in such cases the inference is one of fact, and it was for the jury, and not the court, to determine whether the consent of the conductor was to be fairly inferred from his conduct. We think that the motion for a new trial should have been sustained on this ground.

III. The court gave the following instruction: "If you find from the weight of the testimony that defendant's employes in charge of the train in question stopped it at the proper place at the depot to which plaintiff was destined, to enable her to alight, *and negligently failed to assist her to do so*, or to look and know that she had left the train in safety, and negligently started the train before she, in the exercise of diligence to do so, had reached the platform of the depot, and without any fault on her part she was thrown down and injured, substantially as alleged, your verdict should be for plaintiff.
* * *

The doctrine of this instruction is that it was the duty of defendant's employes to assist plaintiff to alight from the train, and if they negligently failed to perform that duty, and started the train without looking and seeing that she had left it, defendant is liable for the injury. This doctrine cannot be sustained. It is undoubtedly the duty of a railway company to provide suitable and safe means for entering and alighting from its trains. But having done this, and having stopped its train in proper position to enable passengers to avail themselves of those means in entering or alighting, it is not bound to render them personal assistance. The contract of the carrier is that he will carry the passenger safely and in a proper carriage, and afford him convenient and safe means for entering and alighting from the vehicle in which he carries him, but he does not contract to render him personal service or attention beyond

Raben v. The Central Iowa Ry. Co.

that. The train in question was stopped at the platform of the depot, and there is no complaint that that was not a convenient and safe place for alighting from the train. While defendant was bound to keep its train standing at the platform a reasonable time to enable plaintiff to alight in safety, it was not bound to assist her in alighting. It was held by this court in *Allender v. Chicago, R. I. & P. Ry Co.*, 37 Iowa, 264, and in the same case, 43 Iowa, 276, that whether the carrier was bound to assist the passenger in entering or alighting from the car was a question of fact to be determined by the jury. But in that case the passenger was required to get upon the car at a point where no platform or other convenience for entering it was provided, and the holding was based on that state of facts. Our holding in the present case is not in conflict with the holding in that.

IV. The circuit court told the jury in an instruction that, if they found for plaintiff, they should consider the physical pain which she had already sustained in consequence of the injury. Also that, "if they found that her injuries were permanent, they should consider such inconvenience of getting about and pain as they should find reasonably certain to result therefrom in the future, and award her such sum as damages as will reasonably and fairly compensate her therefor." Exception is taken to the language of the quotation. There was evidence which tended to prove that plaintiff had not recovered from the injury at the time of the trial, and that she still suffered pain from it, and that her use of one of her limbs was greatly impaired by it. But the physicians who had attended her were not able to determine whether she would recover, or whether the injury would prove to be permanent. The point urged by counsel is that the evidence did not warrant the court in submitting to the jury the question whether the injury was permanent. But we think the instruction, fairly considered, does not submit that question as an element in the case. There was evidence tending to prove that plaintiff would in the future suffer pain and inconvenience from the

5. PERSONAL injury: damages: permanency of injury: instruction.

Clancy v. Kenworthy.

injury. If so, she was entitled to be compensated therefor, if defendant is liable for the injury, whether it is permanent or not. And those are the matters which the jury were directed to consider, in awarding the damages. The instruction affords defendant no just ground of exception. For the errors pointed out the judgment must be

REVERSED.

74 740.
91 564

CLANCY V. KENWORTHY *et al.*

Constable: OFFICIAL BOND: LIABILITY OF SURETIES FOR ACTS OF OPPRESSION: PLEADING. Action against a constable and his sureties on his official bond. The bond was in the form prescribed by statute (Code, sec. 674), and required the principal to "faithfully and impartially, without fear, favor, fraud or oppression, discharge all the duties * * * of his office." The action was for a breach of the conditions of the bond in unlawfully, maliciously and oppressively arresting, imprisoning and prosecuting the plaintiff. The petition averred that the acts complained of were done by the constable under color and by virtue of his office, but shows that they were unlawfully, maliciously and oppressively done, without probable cause. *Held—*

- (1) That the petition properly alleged a breach of the conditions of the bond.
- (2) That the sureties could not escape liability on the ground that the acts complained of were instigated wholly by private malice, and were in no way connected with the duties of their principal as constable.

Appeal from Mahaska District Court.—HON. W. R. LEWIS, Judge.

FILED, DECEMBER 7, 1887.

ACTION upon the official bond of a constable, to recover, against the principal and sureties, for a breach of its conditions. There was a judgment upon a verdict for plaintiff. Defendants appeal.

Nelson & Williams and W. S. Kenworthy, for appellants.

Phillips & Greer, for appellee.

BECK, J.—I. The bond sued on is in the form prescribed by statute (Code, sec. 674), and obligates the principal to render a true account of his office as constable, to pay over all moneys coming to his hands in the discharge of his official duties, etc., and to “faithfully and impartially, without fear, favor, fraud or oppression, discharge all the other duties now or hereafter required of his office by law.” The petition alleges a breach of the conditions of the bond in the following language: “That on or about the nineteenth day of September, 1885, the said J. C. Kenworthy, as said constable, under color and by virtue of his said office and his official position, did maliciously, unlawfully, and without reasonable or probable cause, and without warrant or any process of any court, arrest the plaintiff, and incarcerate him in the jail of said county, and keep him confined there for the space of about twelve hours, and during one night; that at the time of said arrest the said defendant, under pretense of necessity in order to accomplish said arrest, did, without any cause or provocation, and without reasonable or probable cause therefor, brutally, oppressively, maliciously and unlawfully strike, beat, bruise and wound with a club the said plaintiff on the head, and severely injure and cut the head of the plaintiff, and cause him great bodily and mental pain and suffering; that, after he had so arrested and stricken and wounded the plaintiff, the said defendant placed and incarcerated the plaintiff in said jail as aforesaid, without having or procuring any care or attention or medical treatment to be given to the plaintiff, or the wounds thus made and inflicted upon him, although the plaintiff was badly cut about and upon the head, and bleeding and suffering severely, but left plaintiff in said jail until the following day before said wound was dressed; that afterwards, and while the said defendant still had the said plaintiff in custody, to-wit, September 14, 1885, the said Kenworthy claimed that he arrested

Clancy v. Kenworthy.

the plaintiff because he found him in a state of intoxication, and filed an information against plaintiff, charging him with said offense before one E. D. McNeilan, a justice of the peace in and for said county, and prosecuted the plaintiff on said information for said crime; that the said prosecution is at an end, and the plaintiff has been duly acquitted of said charge; that the said charge and information so made and filed, and said prosecution by said defendant, was false, malicious, and without reasonable or probable cause, and was done by said defendant for the purpose of attempting to cover up and justify his offensive and malicious acts and conduct in arresting and beating the plaintiff, as aforesaid, and harassing, annoying and oppressing the plaintiff."

The jury found a general verdict for plaintiff, and special findings to the effect that the constable did not believe, and had no probable cause to believe, that plaintiff was intoxicated at the time of the arrest; that he had no probable cause for filing the information; and that he used more force in making the arrest than he was authorized to believe was necessary. The defendant moved the court to arrest the judgment on the following grounds: "*First.* The petition does not state facts sufficient to constitute a cause of action, in that the petition shows that the defendant J. C. Kenworthy was a trespasser, and not engaged in the line of his official duty in any of the acts complained of in the petition, and hence the sureties on the bond sued on are not liable therefor, and this action on the bond cannot be maintained. *Second.* The petition and special verdicts show (1) that the defendant J. C. Kenworthy arrested and imprisoned the plaintiff without a warrant, and filed an information against him for being found in a state of intoxication, and that the defendant Kenworthy did all that without probable cause, and without believing that the accused was guilty thereof; (2) that in making said arrest the said J. C. Kenworthy acted maliciously, and used excessive force; (3) that in imprisoning the defendant, and in instituting the criminal proceedings, and in making the arrest, the said J. C. Kenworthy was

Clancy v. Kenworthy.

not actuated by the motives of vindicating or enforcing the law against being found in a state of intoxication, but by some private and malicious purpose, and the sureties on the bond are not liable for such a trespass on the person, nor for such a malicious prosecution, neither being in any manner connected with his duty as constable."

This motion was overruled. The only error assigned by defendants involves the correctness of this ruling.

II. We are of the opinion that the petition alleges a sufficient cause of action against the defendants. The official character of the principal defendant, and that the arrest was made in the discharge of the functions of the office of the constable, are alleged. He was authorized to make the arrest without a warrant. Code, secs. 1548, 4109, 4200. The petition avers that the arrest was made under color and by virtue of the office of constable held by the principal defendant, but shows that it was unlawfully and oppressively made, without probable cause. It is thus shown that he partially, fraudulently and oppressively discharged the duties of the office in arresting plaintiff. It thus clearly appears, from the allegations of the petition, that the conditions of the bond were violated; and, as plaintiff is the injured party, he may maintain this action to recover on the bond the damages he has sustained.

III. But it is insisted that, as the constable is shown to have had no lawful authority to arrest plaintiff, his act was therefore not done in the line of his duty. In truth his act was in the line—direction—of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty, and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he of course is not liable. It follows that, if

The Ind. District of Fairfield v. Farmer.

defendant's position be sound, no action can be maintained upon the bond in any case. In support of our conclusions, see *Tieman v. How*, 49 Iowa, 312.

The judgment of the district court is

AFFIRMED.

THE INDEPENDENT DISTRICT OF FAIRFIELD V.
FARMER *et al.*

Appeal : LAW CASE : BILL OF EXCEPTIONS TO RULINGS ON EVIDENCE : BY WHOM TO BE SIGNED. A bill of exceptions to rulings on evidence in the trial of an ordinary action at law must be signed by the judge, or, in case he refuses to sign the same, by the by-standers. (Code, secs. 2831-2835.) It is not sufficient that the bill be noted by the short-hand reporter and included in the extended transcript of his notes, which is certified by him.

Appeal from Jefferson District Court.

FILED, DECEMBER 9, 1887.

ACTION at law. Trial to the court, judgment for the plaintiff, and the defendant Crawford appeals.

Leggett & McKemey and *M. A. McCoid*, for appellant.

D. P. Stubbs, for appellee.

SEEVERS, J.—The errors assigned are that the court erred in admitting evidence to which the appellant objected. The abstract sets out the objections made, the rulings of the court, and states that the appellant excepted thereto; and it further states that it contains "all the evidence that was offered or introduced on the trial of the cause. The evidence was taken down by the official short-hand reporter of the court, and was extended by him, and preserved by a bill of exceptions as provided by statute, and made a part of the record." An additional abstract has been filed by the appellee,

The Ind. District of Fairfield v. Farmer.

which denies that the abstract "contains all the evidence offered or introduced on the trial of the cause; denies that any exceptions were taken to the rulings of the court, or that the court made any rulings thereon." The statements in the abstract filed by the appellee are denied in an amended abstract filed by appellant. It will be observed that the abstract filed by the appellee, in substance, states that no bill of exceptions was signed by the court, or rather that the rulings made by the court were not preserved by a bill of exceptions. As no bill of exceptions is set out by the appellant in the amended abstract, it is doubtful whether we are required to look into the transcript, but we have done so, and find that the claimed bill of exceptions was noted by the reporter, and that he has extended or made a transcript of his notes, and has certified thereto as above stated.

The appellee has filed a motion to strike out the evidence, and affirm the judgment and rulings of the court in admitting evidence, on the ground that the evidence and such rulings have not been preserved by a bill of exceptions. This leads to the inquiry as to whether it is essential, in the absence of a statute providing otherwise, that a bill of exceptions must be signed by the judge. A bill of exceptions is defined to be an "objection made by a party in a cause to the decision of the court, on a point of law, which, in the confirmation of its accuracy, is signed and sealed by the judge or court who made the decision." Bouv. Law Dict. 175. See, also, *Mays v. Deaver*, 1 Iowa, 216. It may be conceded that the statute provides that, as to some matters, it is not essential that the exceptions shall be signed by the judge; but such is not the case as to the matter in hand. As to it the statute implies, if it does not in terms so provide, that the exceptions shall be so signed, or by the by-standers, which in a proper case is deemed equivalent to a signing by the judge. Code, secs. 2831-2835 inclusive. The latter section provides, if the judge refuses to sign a true bill of exceptions, that it may be signed by the by-standers, but no provision is made that it may be signed by the

 Cook v. The Federal Life Ass'n.

reporter. The presumption obtains that all questions of law are correctly decided by the court, and he who asserts the contrary must exhibit to this court a bill of exceptions signed by the judge or by by-standers, showing the exact question presented to the court, and how it was decided, before we are authorized to review it, unless there is a statute which provides otherwise. While it is true that no particular form is required, such signature or signatures is an essential prerequisite.

We have no occasion to determine what the rule is in equity causes in relation to identifying the evidence. For the reason that the rulings of the court to which errors are assigned have not been preserved and identified by a bill of exceptions, the judgment of the district court is

AFFIRMED.

74	746
79	760
74	746
82	864
74	746
97	824
74	746
103	428
74	746
104	539
74	746
108	10
74	746
118	725
74	746
115	487
74	746
1142	346

COOK V. THE FEDERAL LIFE ASSOCIATION.

Life Insurance : ACTION ON POLICY : DEFENSE : MISREPRESENTATIONS IN APPLICATION : APPLICATION NOT INDORSED ON POLICY : CHAPTER 211, LAWS OF 1880. Action on a life insurance policy. To an answer setting up false representations on the part of the assured in his application, a demurrer was sustained, on the ground that a copy of the application was not indorsed upon, or attached to, the policy, as required by section two, chapter 211, Laws of 1880, to be done, in order to enable the company to rely upon such application, or statements therein, in defense to an action on the policy. To the ruling sustaining the demurrer defendant objects, on the ground that said chapter has no reference to life insurance companies ; but *held* that such objection was not well taken as to said section two, and that the demurrer was properly sustained.

Appeal from Scott District Court.—HON. A. J. LEFFINGWELL, Judge.

FILED, DECEMBER 14, 1887.

ACTION upon a life insurance policy. There was a demurrer to the answer, which was sustained. Defendant appeals.

Cook v. The Federal Life Ass'n.

Geo. E. Hubbell, for appellant.

Cook & Dodge and *Nathaniel French*, for appellee.

ROTHROCK, J.—The policy upon which this action is founded was issued to William E. Cook and payable to the plaintiff, Amanda M. Cook, who is his widow. The answer pleads several defenses, one of which is that the insured, at the date of the policy, was afflicted with piles. Another defense is that the insured was, at the date of the policy, addicted to the immoderate use of intoxicating liquors, and that, as a result thereof, he had a disease called "*delirium tremens*." It appears from the averments of the answer that, when the contract of insurance was entered into, the insured, in a written application therefor, was interrogated as to his physical health, and as to his habits, and that he answered therein that he was not addicted to the immoderate use of intoxicating liquors, and that he did not have the disease called "piles." It is alleged that the answers to these questions were false and fraudulent, and that by reason thereof the plaintiff had no right of action upon the policy. The demurrer was upon the ground that the matters averred in the answer were not a defense to the action, because a copy of the application for the insurance was not endorsed upon, nor attached to, the policy. Whether the defendant may avail itself of the defenses pleaded, conceding the fact to be that a copy of the application is not endorsed upon, nor attached to, the policy, is the sole question presented for determination.

The question involves an examination of chapter 211 of the Acts of the Eighteenth General Assembly. The title of the act is in these words: "An act relating to insurance and fire insurance companies." The first section is as follows: "Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance

Cook v. The Federal Life Ass'n.

company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." Section two is as follows: "All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or endorse thereon, a true copy of any application or representations of the assured, which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but, if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving such application or representations, or any part thereof, in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representations, but may do so at his option." Section three of the act appears to refer to fire insurance companies. It has several provisions which are inapplicable to life insurance; such as that, in case of loss of any insured building,* "the amount stated in the policy shall be received as *prima-facie* evidence of the insurable value of the property at the date of the policy." The closing sentence of the section is as follows: "All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

Considering the title of the act and all of its provisions, it seems to us to be very clear that it applies in its first and second sections to all kinds of insurance. There can be no doubt that section one applies to any and all classes of insurance, whether life, fire, marine, insurance of live stock, or any other kind of insurance; and the same may be said of the second section. To hold otherwise would, it seems to us, be inconsistent with and repugnant to the title of the act. If all insurance was not contemplated, the title would have been simply

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Watkins v. Jenkins.

“An act relating to fire insurance companies.” The general term, “relating to insurance,” if all insurance was not intended, would not have been used. We are not disposed to hold that such unnecessary repetition would have occurred in the title. The publication was made by the secretary of state in the usual way. He first gives the number of the chapter, followed by a heading in these words: “Relating to Fire Insurance.” There are also the marginal notes required by section thirty-five of the Code. The marginal notes are no part of the statute. They are merely for convenience in examining it. The head-lines are not provided for by statute, and yet they are inserted, probably for the same purpose as the marginal notes. But these are not to be considered in construing the statute, for the simple reason that they are not a part of the law. We are asked to hold, because of the head-line, and because of the arrangement of this statute in our Annotated Code, with reference to other statutes, that the act in question has no reference to life insurance companies. We cannot so hold, in view of the fact that the second section requiring the application to be attached to, or indorsed on, the policy, applies in terms to “all insurance companies,” and there is no good reason why it ought not to apply to life insurance companies.

AFFIRMED.

WATKINS V. JENKINS *et al.*

Will : CONSTRUCTION : APPLICATION OF ASSETS TO PAYMENT OF DEBTS.

On the petition of the executor certain provisions of a will, which relate to the application of the assets to the payment of the debts, are construed. (See opinion for will and decree construing same.)

Appeal from Scott Circuit Court.—HON. NATHANIEL FRENCH, Judge.

FILED, DECEMBER 19, 1887.

Watkins v. Jenkins.

ACTION wherein the plaintiff, as executor, prays for a decree fixing the interpretation of the will of his testate. A decree answering the prayer of the petition was rendered, from which a part of the defendants appeal.

D. B. Nash, for appellants.

Cook & Dodge, for appellee.

BECK, J.—I. The plaintiff, the executor of the estate of William E. Haskins, deceased, presented his petition to the district court, alleging that the construction and meaning of some of the provisions of the will under which he is acting are involved in doubt, and that it is necessary that such provisions be judicially construed. The portion of the petition presenting the questions for determination arising in the construction of the will, and the parts of the will and codicils necessary to be considered in making such construction, are presented by the abstract in the following language:

“PETITION.

“(3) That petitioner presents for the court's consideration, with respect to their construction and meaning, the following provisions of said will:

“Sections four and thirteen thereof: Can petitioner sell the north half of said town lot, and apply the proceeds as payment on the fifteen hundred dollar mortgage which is on the farm? * * *

“Sections four and eighteen of will, and section two, codicil one, and section two, codicil three: (a) Shall the trustee pay off the mortgage of fifteen hundred dollars which is on the farm? (b) Shall he do so with the general funds of the estate? (c) If so, shall he reserve a lien in favor of the general estate against said farm for amount of such payment? (d) Shall he refund the debt, and make a new mortgage at eight per cent.? If so, shall he mortgage the fee, or only Harriet Purdy's life estate? (e) The

Watkins v. Jenkins.

trustee has expended some of the general funds of the estate in making payment of two notes,—one for one hundred and twenty-five dollars, and one for fifteen dollars,—which were given by testator for articles bought for the farm. *Question.* Should the trustee sell the town lot (secs. 4 and 13), and from the proceeds pay the general fund what said notes amounted to when paid? The trustee has also made permanent improvements on the farm from proceeds of the rents. *Question.* Can trustee, from the sale of the lot, repay upon the fifteen hundred dollar mortgage an amount equal to what was so expended in such permanent improvements out of such rents, which rents could have been applied on the mortgage? * * *

“WILL.

“I devise * * * to Charles S. Watkins * * * all my property, real and personal and mixed, * * * *in trust* * * * for the following uses and purposes: * * * (4) To deliver to my daughter, Harriet (wife of Wm. Purdy), all my household goods * * * including silver and plated ware, also * * * buggy, * * * blankets, * * * robe, harness and sleigh, * * * all of which I bequeath to her. Also to deliver to said Harriet, on the first day of March next after my decease, the full possession of the following tracts and parcels of real estate, situated in Scott county, Iowa, to-wit: The certain farm of one hundred and fourteen * * * acres, situated in Pleasant Valley township, formerly belonging to S. P. Matthews, and which I purchased of him by written contract for deed, of date October, 1882, providing for the delivery to me by said Matthews of a deed thereof, on the first day of January, 1883; also the north half of the lot of land situated on the east side of Brady street, north of Sixteenth street, in Davenport; * * * in which said farm property, and in which said north half of said lot of land, respectively, I hereby bequeath to her, said Harriet, a life estate during her natural life. And it is my will during the existence of said life estate in each of said tracts and parcels of land, said Harriet shall

Watkins v. Jenkins.

keep the improvements thereon in good repair, and keep the taxes paid, and the tenements thereon properly insured. And in case said trustee shall at any time think it for the best interests of said Harriet, he is hereby authorized to sell the north half of said lot of land above described, and expend the net proceeds thereof in making any improvements on said farm property he may deem best; and the life estate in said north half of said lot * * * is made subject to such sale for such purpose. And it is further my will, as soon as practicable after the decease of said Harriet, that said trustee shall sell said farm property, and the tract of real estate last above described (if not already having been sold to make improvements on said farm property, as above provided); said trustee using his discretion as to the terms of sale. * * * And it is further my will that * * * said trustee shall pay the net proceeds of such sale or sales to such child or children of said Harriet as shall survive her, share and share alike; such payment to be made to each such child upon attaining the age of twenty-five years, if not already having attained such age; and, if necessary, such proceeds are to be invested by said trustee to that end,--which said distributive shares I hereby bequeath to them, respectively." "(13) It is my will that said trustee be authorized at any time during the life of said Harriet, in his discretion, to sell the north half of said real estate situated on the west side of Brady street, north of Sixteenth street, in which I have bequeathed to her a life estate, and apply the net proceeds thereof in making improvements on the above-mentioned farm property; and the bequest of said life-estate * * * is subject to this provision. Said trustee, in his action in the matter, is to be guided by the best interest of Harriet. * * * (18) I having purchased the farm property above mentioned from S. P. Matthews by contract for deed, of date October 25, 1882, which contract provides that the sale shall be finally consummated on the first day of January, 1883, by the said Matthews

Watkins v. Jenkins.

delivering to me a good and sufficient deed of conveyance of said farm, and by the said Matthews receiving from me a certain house and lot on the east side of Farnam street, near Locust street, and the payment by me of the balance of the purchase money with and out of the avails of certain mortgages owned by me, it is my will that said trustee shall carry out and consummate the purchase of said farm in accordance with said contract. * * *

“CODICIL 1.

“(2) It is my will that said trustee shall, for the period of six years next after my decease, have control of the possession of the farm mentioned in my last will (and which I purchased of S. P. Matthews), together with the rents, issues and profits thereof, and shall, during that period, so far as practicable, pay from and out of such rents, issues and profits any mortgage, incumbrance, or any charge upon said farm, and existing as an indebtedness properly chargeable against my estate; and, also, shall further pay, during the aforesaid period of time, out of such rents, issues and profits, all other indebtedness, either evidenced by promissory notes, or in open accounts against my estate, and which indebtedness accrued through and by means of purchases by me of agricultural implements, horses, hay, etc., and now being and used upon the aforesaid farm by Wm. Purdy as my tenant. But it is my will that my said trustee shall so control such possession of such farm, and such rents, issues and profits, and the payment from and out of the same any such indebtedness or incumbrance as aforesaid, in view of the promotion of the best interest and welfare of my daughter, Harriet; it being my will that said Harriet shall yearly receive all the net rents and profits of said farm which may be consistent with the due satisfaction of any such indebtedness as aforesaid within a reasonable time, and after the paying all the yearly taxes, proper repairs, and insurance on said farm, which it is my will shall be paid from and out of such

Watkins v. Jenkins.

rents, issues and profits. All the provisions of my last will is hereby modified so as to be consistent with the provisions of this codicil. * * *

The district court, declaring the construction of the will, rendered a decree in this language: "It is ordered, adjudged and decreed that the general estate and assets are not liable for the payment of the farm mortgage; that the trustee should use the rents and profits of the farm for six years from the decease of the testator towards the payment of the mortgage debt, or any renewal thereof; and he may, in his discretion, under the will, sell the farm subject to the mortgage and invest the proceeds. It is further decreed that he cannot mortgage the farm, nor sell a portion thereof, unless first having obtained the order of the court, upon due notice to all concerned, upon which notice and order he may be authorized to make such sale or mortgage, and with the proceeds pay the present mortgage debt, which is by the holder thereof enforceable against said farm. It is also ordered that the Brady-street lot may be sold by the trustee, in his discretion, and proceeds paid upon the mortgage debt to the extent that the rents have been used to make permanent improvements. And it is ordered that the trustee take the rents from said farm, and therewith reimburse the general estate for the amounts paid upon the debts which were chargeable upon the farm for articles bought for the farm."

II. In our opinion, the district court, in the decree, correctly construed the will. It holds that the general assets of the estate cannot be applied to the payment of the mortgage in question; that is, the funds arising from the sale of personal property or lands cannot be applied to that purpose, but that, under the provisions of the will, the rents and profits of the farm for six years shall be applied upon the mortgage, and that the Brady-street lot may be sold, and the proceeds paid upon the mortgage to the extent to which the rents of the farm have been used in payment of improvements thereon, and the rents of the farm be appropriated to take the place of general assets used to make

Watkins v. Jenkins.

permanent improvements. We think the decree is in accord with the plain meaning of the will and the intention of the testator as therein expressed. The will gives to Mrs. Harriet Purdy a life estate in the farm and the Brady-street lot. (Par. 4.) The Brady-street lot may be sold, and the proceeds applied in payment of improvements made on the farm. (Par. 13.) But it is provided by the second paragraph of the first codicil that the executor shall take the rents and profits of the land, and apply them to the payment of any mortgage or charge thereon, and any sum remaining from the proceeds of the rent after the payment of the incumbrance shall be paid to Mrs. Purdy. The will thus, in the plainest language, directs that the rents and profits of the land be first appropriated to the payment of the incumbrance. In the thirteenth paragraph of the will, and the second paragraph of the first codicil, the trustee is directed to be guided by the best interest and the welfare of Mrs. Purdy; but, in express language, the second paragraph of the first codicil declares that the payment of the rents and profits to her is to be made after the indebtedness specified is paid. The expressions found in the will and codicil directing her interest and welfare to be promoted by acts of the executor do not express the thought that her interest and welfare shall nullify the provision to the effect that the rents and profits shall be applied to the payment of the incumbrance, which is positive and plain in its language, and cannot be defeated upon inference and construction.

III. Counsel for defendants insist that the personal estate constitutes the primary fund for the payment of the testator's debts, but that funds arising from his real estate may, by express provisions of the will, be devoted to that purpose. We need not determine the correctness of this view of the law, but may assume that it is correct for the purposes of the case. In this view of the law, the decree of the district court is correct, for, in our opinion, the will and codicils in the plainest language direct that the incumbrance be paid out of the rents and profits of the land.

Watkins v. Jenkins.

IV. The will directs that the Brady-street lot may be sold to pay for improvements upon the land. The decree properly directs that lot to be sold, and the proceeds applied upon the mortgage, so far as may be necessary, to take the place of rents applied in payment of improvements. The rents should not have been so applied, and the Brady-street lot is set apart for that purpose. The decree thus carries out the directions of the will, and provides for correcting what was done contrary to such directions.

V. The provision of the decree for reimbursing out of the rents the general funds of the estate for payments made for articles bought for the farm, we think is correct, being in accord with paragraph two of the first codicil.

VI. The eighteenth paragraph of the will cannot be construed as a direction for the payment of the mortgage out of any particular fund, nor does it nullify other provisions requiring it to be paid out of the rent of the land. It contains no provision whatever as to payments, but simply directs that the purchase be consummated. It cannot be said that this paragraph gives any directions as to the funds to be used in the payment due on the land. That, however, is done in other parts of the will, which requires the rent to be used for that purpose. Paragraph two of the first codicil so provides in plain language.

These considerations dispose of all disputed questions found in the case, and lead us to the conclusion that the decree of the district court ought to be

AFFIRMED.

APPENDIX.

NOTES OF CASES NOT OTHERWISE REPORTED.

THE STATE V. BENNETT.

Appeal : CRIMINAL CASE : RECORD EXAMINED.

Appeal from Black Hawk District Court.

FILED, MARCH 12, 1888.

No appearance for either party.

BECK, J.—The defendant was convicted upon an indictment for larceny, and appeals to this court. There is no assignment of errors, nor brief or argument in any form, calling our attention to any objections to the proceedings. Upon an examination of the record we have failed to find any error therein. The judgment of the district court is, therefore,

AFFIRMED.

SHEAR V. BOLINGER *et al.*

Intoxicating Liquors : REMOVAL OF CAUSES TO FEDERAL COURTS.
(*Shear v. Kelson*, 73 Iowa, 705, followed.)

Appeal from Chickasaw District Court.

FILED, MARCH 12, 1888.

THIS is an action in equity to enjoin and abate a nuisance which it is alleged the defendants are maintaining by keeping a saloon. An application was made for the removal of the cause to the circuit court of the United States, which was sustained, and an order of removal was made. From this order plaintiff appeals.

J. H. Powers, for appellants.

Hiram Shaver, for appellees.

ROTHROCK, J.—It was held in *Shear v. Kelson*, and other cases determined at the present term, that the defendants in causes like this have no right to remove the same to the federal court. Following those cases the order of removal in this case is

REVERSED.

LITCHFIELD V. THE IOWA HOMESTEAD COMPANY *et al.*

Former Adjudication : RECOVERY OF TAXES PAID UNDER MISTAKE
(*Goodnow v. Burrows*, ante, pp. 251 and 256, followed.)

Appeal from Webster District Court.

FILED, MARCH 12, 1888.

C. H. Gatch, for appellants.

George Crane, for appellee.

BECK, J.—The facts of this case bring it within the rules and doctrines of *Goodnow v. Burrows* as announced in the original opinion, and the opinion upon rehearing filed at the present term of this court. See ante, pp. 251 and 256. Following the decision in that case the judgment in this is

REVERSED.

GOODNOW V. BURROWS *et al.*

Recovery of Taxes Paid by Mistake. (*Goodnow v. Wells*, 67 Iowa, 654, and *Same v. Litchfield*, 67 Iowa, 691, followed.)

Appeal from Webster District Court.

FILED, MARCH 12, 1888.

ACTION in equity to recover taxes paid. Judgment for the plaintiff and defendants appeal.

Nourse & Kaufman, for appellants.

Geo. Crane, for appellee.

SEEVERS, C. J.—The facts in this case and the questions argued by counsel are precisely the same as in *Goodnow v. Wells*, 67 Iowa, 654, and *Goodnow v. Litchfield*, 67 Iowa, 691, and as we are not disposed to overrule those cases, the result is that the judgment of the district court must be

AFFIRMED.

THE STATE V. CLAYTON.

Appeal: CRIMINAL CASE SUBMITTED ON RECORD: AFFIRMED.

Appeal from Harrison District Court.—**HON. C. H. LEWIS**, Judge.

FILED, MAY 22, 1888.

John H. Keatly, for appellant.

A. J. Baker, Attorney General, for the State.

SEEVERS, C. J.—The defendant was indicted for keeping and maintaining a nuisance caused by selling and keeping for sale intoxicating liquors contrary to law. There was a trial by jury; the defendant was found guilty, judgment was rendered on the verdict, and the defendant appeals.

This cause was submitted on a transcript which contains the indictment, instructions, motion for a new trial, which was overruled, and judgment, and nothing more that is material. We are unable to discover any error in the record, and therefore the judgment of the district court is

AFFIRMED.

THE STATE V. BAKER.

Intoxicating Liquors : NUISANCE : NO ARGUMENT : AFFIRMED.

Appeal from Wapello District Court.

FILED, MAY 22, 1888.

DEFENDANT was indicted for the crime of nuisance, committed by owning and keeping, and by being concerned, engaged and employed in owning and keeping, intoxicating liquors with intent to sell the same within the state contrary to law. He entered a plea of guilty and was adjudged to pay a fine of three hundred dollars, an attorney fee of twenty-five dollars, and the costs of prosecution, and was adjudged, in case of default in the payment of the fine and costs, to be imprisoned at hard labor in the jail of Wapello county, for the term of one hundred and two days. The abatement of the nuisance, destruction of liquors and sale of the movable property used in carrying on the unlawful business were also ordered. Defendant appeals.

ROBINSON, J.—This cause was submitted in this court on a transcript of the record, and without argument for either party. We have examined the record but discover no material error.

AFFIRMED.

THE STATE V. KRANER *et al.*

Appeal : CRIMINAL CASE : NO EXCEPTIONS OR ARGUMENT : AFFIRMED.

Appeal from Wapello District Court.—HON. CHARLES D. LEGGETT,
Judge.

FILED, MAY 23, 1888.

THE defendants were indicted and convicted for maintaining a nuisance by keeping a place for the unlawful sale of intoxicating liquors, and now appeal to this court.

No appearance for the appellants.

A. J. Baker, Attorney General, for the State.

BECK, J.—The cause was submitted to us for decision without exceptions or argument in any form for the appellants. The record shows that questions involving the constitutionality of the statute under which the indictment was found, and other questions usually raised in trials for offenses of this character, were raised by objections in the court below, and were ruled upon in accord with frequent prior decisions of this court. It is needless to consider that question here.

We have, as we are required by the statute, examined the record of the case before us, and have discovered no error therein. We are not required to imagine possible objections and present reasons supporting the rulings of the district court as against them. The judgment of the district court is

AFFIRMED.

THE STATE V. KAISER.

**Intoxicating Liquors: NUISANCE: NO APPEARANCE OR ARGUMENT
FOR APPELLANT: AFFIRMED.**

Appeal from Wapello District Court.

FILED, JUNE 4, 1888.

INDICTMENT for a nuisance in owning and keeping intoxicating liquors for sale in a certain building contrary to law. The defendant pleaded guilty, and it was adjudged that he pay a fine and the costs of the action, and an order was made for the abatement of the nuisance. Defendant appeals.

No appearance for appellant.

A. J. Baker, Attorney General, for the State.

ROTHROCK, J.—The appeal is presented to us upon a transcript of the indictment, plea and judgment and order of the court. So far as appears upon the face of the record the judgment and order are correct, and we can discover no ground for disturbing them.

AFFIRMED.

JORDAN V. THE WAPELLO DISTRICT COURT *et al.* (*Two Cases.*)

Saloon Nuisance : INJUNCTION : CONSTITUTIONALITY OF STATUTE.

Original proceedings in this court on certiorari.

• FILED, JUNE 8, 1888.

PER CURIAM.—These are proceedings in *certiorari* in which writs were issued from this court to the district court of Wapello county.

The causes are submitted to us upon the petitions for the writs and the returns thereto, without any arguments or appearance of counsel. It appears from the petitions and returns that an action in equity was brought in the district court against the plaintiff herein, in which he was enjoined from keeping and maintaining a saloon nuisance, and that a temporary injunction was issued which he violated, and for which violation he was adjudged guilty of contempt; and that a permanent injunction was decreed against him which he also violated. He seeks by these proceedings in *certiorari* to set aside said proceedings for contempt upon the ground that the law authorizing the same is unconstitutional and void, and he sets up certain proceedings in the district and circuit courts of the United States, and claims that by reason thereof he is not subject to the jurisdiction of the courts of this state. These proceedings in the federal courts are founded upon the alleged unconstitutionality of the laws of this state under which the injunction and contempt proceedings were had. As the supreme court of the United States has in effect determined that question, and as the plaintiff herein does not appear to prosecute these actions, they will be
DISMISSED.

THE STATE V. STATON *et al.*

Criminal Case : NO ARGUMENTS : NO ERROR FOUND : AFFIRMED.

Appeal from Sac District Court.—HON. J. H. MACOMBER, Judge.

FILED, JUNE 8, 1888.

THE defendants were indicted for the crime of mingling poisons with drink with intent to injure a human being. They were found guilty by a jury, and from the judgment rendered on the verdict appeal.

ROBINSON, J.—This cause was submitted to us upon a transcript of the indictment, verdict, motions for a new trial and judgment. No errors were assigned, and no argument was made for either party. In this condition of the case we have examined the record with care, but have failed to discover any error of which appellants can justly complain. The judgment of the district court is therefore

AFFIRMED.

THE STATE V. KING.

Criminal Case : NO ARGUMENTS : NO ERROR FOUND : AFFIRMED.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, JUNE 9, 1888.

DEFENDANT was tried, in justice's court, for the offense of keeping intoxicating liquors with intent to sell the same in violation of law. He was convicted and thereupon appealed to the district court of Polk county. He was again tried, found guilty and adjudged to pay a fine of fifty dollars and costs. He now appeals from that judgment.

ROBINSON, J.—This cause was submitted on a transcript of the information and amendment thereto, and of the other papers and proceedings in the case, excepting the evidence. No argument has been made for either party and no errors have been assigned. We have examined so much of the record as has been submitted to us, but discover no error. The judgment of the district court is therefore

AFFIRMED.

THE STATE V. ULLINS.

Criminal Case : NO ARGUMENTS : NO ERROR FOUND : AFFIRMED.

Appeal from Polk Circuit Court.—HON. JOSIAH GIVEN, Judge.

FILED, JUNE 9, 1888.

INDICTMENT for a nuisance caused by the defendant selling and keeping for sale intoxicating liquors. He pleaded not guilty. Trial by jury, verdict and judgment. The defendant appeals.

No appearance for appellant.

A. J. Baker, Attorney General, for the State.

SEEVERS, C. J.—This case was submitted on a transcript, which contains the indictment, plea, instructions, motion for a new trial, which was overruled, and the judgment of the court. No argument has been filed. We have examined the record and reach the conclusion that there is no error in the record, and, therefore, the judgment of the district court must be

AFFIRMED.

WASSON *et al.* v. THE FARMERS' & TRADERS' BANK.

Accounting: EVIDENCE JUSTIFYING CHARGES.

Appeal from Decatur District Court.—HON. R. C. HENRY, Judge.

FILED, SEPTEMBER 5, 1888.

ON the eleventh day of July, 1876, the First National Bank of Leon entered into a written contract with the Farmers' & Traders' Bank of the same place, by which the said First National Bank sold to said Farmers' & Traders' Bank its good will and business, and its assets, and the Traders' Bank assumed the payment of the liabilities of the national bank. The plaintiffs were stockholders in said national bank the capital of which was seventy-five thousand dollars, which was all paid up, and of which the plaintiffs owned in the aggregate thirty-nine thousand dollars. They brought this action in equity against the Farmers' & Traders' Bank, and claim in the petition that said bank has not accounted to them and the other stockholders of the national bank for the surplus money of the bank, amounting to some twenty-one thousand dollars. The defendants answered the petition at great length, in which they pleaded a full settlement, and claimed that payment had been made of all the money required to be paid by one bank to the other. The plaintiffs in reply especially charged that two items of credit, amounting to about thirty-six hundred dollars, were unjust and fraudulent, and should not be allowed as against the stockholders of the national bank. Upon a full hearing the court found for the defendants, and dismissed the petition. Plaintiffs appeal.

W. F. Vermilion and *T. B. Perry*, for appellants.

R. L. Parish and *T. M. Stuart*, for appellee.

ROTHROCK, J.—The First National Bank at the time of the sale was transacting a general banking business, and had been so engaged for several years. Upon making the sale, it ceased to do business as a bank, and the Farmers' & Traders' Bank succeeded to the business, and carried it on without any interruption by reason of the sale. None of the stockholders in the national bank became stockholders in the new bank. As has been stated, the plaintiffs were the owners of but part of the stock. The other stockholders refused to join in the action as plaintiffs for the reason that they were satisfied with the accounting made by the Farmers' & Traders' Bank, and did not believe that anything was due to them as stockholders. They were therefore made defendants in the action.

The evidence introduced on the trial of the case was very voluminous. It was the purpose of the parties when the contract was made that a final settlement of the whole matter should be effected within a short time. But certain actions were commenced in the federal court against the national bank on charges for taking usurious interest, and these suits were not finally determined until the year 1880. When the sale was made it was upon full consultation and by the express assent of all the stockholders. The evidence shows quite satisfactorily that it was agreed among the stockholders that the defendants, John Clark, Hon. J. W. Harvey and L. P. Sigler, who was cashier of the old and also of the new bank, should conduct the settlement of the business between the two banks made necessary by the sale; and it appears that a final settlement was made in the year 1880. In this settlement two charges were made against the national bank for alleged premiums on government bonds, amounting in the aggregate to about thirty-six hundred dollars. The plaintiffs in the course of the trial settled down upon these two items as false and fraudulent, and the arguments of counsel in this court are directed to that question alone.

It will be observed that there is no question of law presented for our consideration. It is purely a question of fact as to whether the charges made are true or false.

It appears from the evidence that the national bank had been accustomed to receive money on deposit and issue certificates of deposit payable in government bonds. There is no evidence that the bank actually procured bonds and delivered them to the depositors. The fact is the depositors were not actual purchasers of bonds. These transactions usually occurred shortly before the month of January, and the object of the depositor was to represent to the assessor that his money was invested in government bonds, and thus escape taxation. Whatever may be thought of this method of preparing for the annual interview with the assessor, the plaintiffs are in no position to complain of it, for it appears that they availed themselves of it by making deposits in the bank and taking certificates of this kind.

These government bonds could not be purchased at par; they were sold at a premium, and the evidence tends to show that in some instances

depositors took a certificate of deposit payable in government bonds for a certain amount, and at the same time, paid in addition to the amount named in the certificate of deposit, a sum equal to the premium on the bonds of that date. In a transaction of this kind, when the certificate of deposit was presented for payment, the bank could not discharge it by paying the amount therein named in currency. It was payable in government bonds, and could only be discharged by paying the amount named, and the premium on the bonds in addition. Now this is the real question in dispute in this case,—that is, whether the Farmers' & Traders' Bank assumed premiums to the amount of thirty-six hundred dollars on this character of certificates of deposit. The bank and the holders of a majority of the stock have settled the matter up, made their statements upon the theory that they were proper charges, and the plaintiffs dispute the proposition and claim that the charges are false and fraudulent.

As has been said, the evidence takes a wide range, and counsel have discussed the case at great length, and we have given the evidence a most careful and thorough consideration, weighing and scrutinizing it item by item and fact by fact, and our conclusion concurs with that of the learned district judge who tried the case, that there should be a finding for the defendants.

We cannot set out or discuss the evidence. It would be of no avail to any one, and the bearings of the different items of the testimony of the witnesses, and the evidence furnished by the written contract of sale, and the entries and want of entries upon the books of the bank, could not be made intelligible in an opinion. These are all fully discussed by counsel in argument, and our attention called to every fact in the case. We think the cause must be

AFFIRMED.

INDEX.

ABSTRACT OF RECORD.

See PRACTICE IN SUPREME COURT, *passim*.

ADVERSE POSSESSION.

1. **WHAT IS NOT.** Possession by plaintiff of a disputed strip of land taken and held for fifteen years in the belief that it was a part of the quarter-section owned by him, and with no intention of claiming any land beyond his own quarter-section, was not adverse possession so as to give him title under the statute of limitations to any land not embraced in his quarter-section. (Compare *Grube v. Wells*, 34 Iowa, 148, and *Skinner v. Crawford*, 54 Iowa, 119). *Mills v. Penny*, 172.
2. **BY TENANT IN COMMON: STATUTE OF LIMITATIONS.** The seizin and possession of one tenant in common are the seizin and possession of the others, and the statute of limitations will not operate in favor of the former to give him title by adverse possession, unless it be sole and exclusive, with the knowledge and acquiescence of the co-tenants. (Compare *Burns v. Byrne*, 45 Iowa, 285, and see opinion for application of rule). *Killmer v. Wuchner*, 359.
3. **TITLE BY: EVIDENCE.** In 1868 or 1869, plaintiff owned a certain lot, but did not own any adjacent land. Defendant claims that plaintiff then agreed with defendant's grantor that the latter should fence the lot and pay the taxes. Defendant's grantor built the fence, but built it so as to include more land than the lot contained, which additional land was included in a tract bought by plaintiff in 1886. In 1871 plaintiff conveyed to defendant's grantor the lot intended to be fenced, and defendant, having by himself and grantor been in possession of the fenced land for more than ten years, now claims title to the excess of land by adverse possession, on the ground that plaintiff directed the fence to be built where it was. But *held* that, before defendant could invoke the doctrine of adverse possession, he had to establish, by a preponderance of the evidence, (1) that plaintiff directed the fence to be built where it was, and (2) that defendant's grantor intended to include more land within the fence than was included within the lot, and was not merely mistaken as to where the boundary was; both of which propositions defendant failed to establish. *Sweny v. Bruns*, 701.

AGENCY.

1. **CHARGING PRINCIPAL'S DEBT TO AGENT: PRINCIPAL NOT DISCHARGED.** Where one knowingly deals with an agent within the scope of his agency, and makes charges on his books to the agent, instead of to the principal, on account of debts contracted for the principal, he is not thereby precluded from afterwards asserting the claim against the principal. *Guest v. Burlington Opera-House Co.*, 457.

2. **RATIFICATION.** See Payment, 2 ; Real Estate, 1.

See **INSURANCE**, 7, 9 ; **RAILROADS**, 1 ; **TAX SALE AND DEED**, 13, 14 ; **VENDOR AND VENDEE**, 2.

ALIBI.

See **CRIMINAL LAW**, 16, 18, 19, 25.

ALIMONY.

See **DIVORCE**, 2-5.

AMENDMENT.

1. **OF PLEA.** See Pleading, 4.

2. **OF ASSIGNMENT OF ERROR.** See Practice in Supreme Court, 2.

APPEAL.

(1) *To Supreme Court.*

1. **FOUNDATION FOR : DEMAND IN LOWER COURT.** When a party to an action has once properly demanded a right which has been denied him by order of the court, he is not required to make the same demand, in substance, a second time, in order to be entitled to an appeal. *Clinton Nat. Bank v. Studemann*, 104.

2. **TIME OF TAKING : DATE OF JUDGMENT.** The time for taking an appeal dates from the time when the judgment appealed from is rendered as shown by the judgment itself, and not from the date shown by the clerk's filing, where there is a discrepancy. (Compare *Carter v. Sherman*, 63 Iowa, 694). *Buck v. Holt*, 294.

3. **ABSTRACT MUST SHOW THAT APPEAL WAS TAKEN.** Where the abstract does not show that an appeal was taken, this court has no jurisdiction, except to dismiss the case, even though the appellee appears and raises no question of jurisdiction ; for appearance does not confer jurisdiction upon an appellate court, and it is the duty of the court of its own motion to see that the case is one of which it appears to have jurisdiction. *Plummer v. Peoples' Nat. Bank*, 781 ; *Names v. Names*, 213.

4. **NO SHOWING OF SERVICE OF NOTICE.** Where the abstract contains a notice of appeal, but contains no evidence or averment that such notice was served on the appellee or his attorney, or on the clerk of the trial court, this court has no jurisdiction except to dismiss the case. *Michel v. Michel*, 577.

5. **JURISDICTION : AMOUNT.** Where plaintiffs in their petition demanded one hundred and twenty-five dollars, *held* that, had they recovered the full amount of their demand, it would have been one hundred and twenty-five dollars, with interest from the commencement of the action ; so that a subsequent tender of twenty-five dollars and costs did not reduce the amount in controversy to one hundred dollars, and did not deprive plaintiffs, upon the rendition of a judgment in their favor for twenty-five dollars, of the right to appeal to this court without a certificate of the trial judge. (See cases cited in opinion). *Griffin v. Harriman*, 438.

6. **— : AMOUNT IN CONTROVERSY.** Where the petition claimed to recover \$94.70 and interest from a certain date, and the interest from that date to the date of judgment swelled the amount to more than one hundred dollars, *held* that the petition claimed more than one hundred dollars, and that the judgment was reviewable on appeal without a certificate. *Koltze v. Messenbrink*, 242.

7. ——— : LESS THAN ONE HUNDRED DOLLARS : CONTENTS OF CERTIFICATE. Where an appeal involves less than one hundred dollars, it is necessary, in order to give this court jurisdiction, for the trial judge to state that the questions of law certified by him are involved in the cause. (Compare *Van Sickle v. Downs*, 72 Iowa, 624). *Ball v. Van Riper*, 146.
8. ——— : LESS THAN ONE HUNDRED DOLLARS : REQUISITES OF CERTIFICATE OF TRIAL JUDGE. In a case involving less than one hundred dollars, it is not sufficient, to give this court jurisdiction, for the trial judge to certify certain questions upon which he says it is desirable to have the opinion of the court. It is necessary also to certify that the questions are involved in the determination of the case. *Beach v. Donovan*, 543.
9. ——— : JUDGMENT REDUCED BELOW ONE HUNDRED DOLLARS BY REMITTITUR. Where plaintiff's demand and the verdict in his favor were both for more than one hundred dollars, but before judgment he amended his petition, against defendant's objection, so as to claim only \$99.99, and remitted from the verdict all in excess of that amount, *held*, on an appeal by defendant, that only \$99.99 was involved, and that this court had no jurisdiction in the absence of questions certified by the trial court. (Compare *Bateman v. Sisson*, 70 Iowa, 518; *Milner v. Gross*, 66 Iowa, 252). [REED, J., dissenting.] *Wilson v. Hawkeye Ins. Co.*, 212.
10. BY COUNTY FROM ORDER TAXING COSTS IN CRIMINAL CASE. See Costs, 8.
11. FROM ORDER FOR TEMPORARY ALIMONY. See Divorce, 2.
12. SUCCESSION OF JUDGES : WHO CERTIFIES EVIDENCE. See Practice in Supreme Court, 8, 4.

(2) *From Justice's Court.*

See CRIMINAL LAW, 4, 5.

(3) *From Board of Equalization.*

See TAXATION, 2.

APPEARANCE.

EFFECT OF. See Appeal, 8.

ASSAULT AND BATTERY.

1. EVIDENCE OF MALICE : OLD THREATS. In an action for assault and battery, evidence that one of the defendants had, two years before, in the anger of a lawsuit, said to the plaintiff, "Never mind; I will fix you yet," was erroneously admitted to prove malice in the alleged assault, which had no relation to the suit. *Irwin v. Yeager*, 174.
2. EXEMPLARY DAMAGES : NO MALICE. In an action for assault and battery, exemplary damages cannot be allowed unless the assault is found by the jury to be malicious. *Id.*

See HIGHWAY, 1.

ASSAULT WITH INTENT TO KILL.

See CRIMINAL LAW, 31, 35.

INDEX.

ASSESSOR.

See TAXATION, 5.

ASSESSMENT.

See TAXATION.

ASSIGNMENT.

See CHATTEL MORTGAGE, 6.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. **TIME OF FILING CLAIMS : SENDING BY MAIL.** It is the duty of a person having a claim against one who has made an assignment to present his claim to the assignee within the time required by statute ; and if he intrusts it to the mails, he does so at his own risk ; and if it reaches the postoffice of the assignee on the evening of the last day, but is not received by him until the next morning, it is too late, and he cannot claim relief on the ground of the negligence of the assignee in failing to take it from the office. *Conlee Lumber Co. v. Meyer*, 403.
2. ——— : **LIMIT : DUTY OF ASSIGNEE.** A creditor who fails to file his claim with the assignee within three months after the first publication of the notice of assignment is not entitled to share *pro rata* in the dividends of the estate. (*Assignment of Holt*, 45 Iowa, 301, *followed*.) And it is the duty of the assignee to resist an attempt to have such claim paid as if filed in time, even though no creditor files exceptions to it. *Id.*
3. **PROSECUTION OF BELATED CLAIM : EVIDENCE OF PUBLICATION OF NOTICE OF ASSIGNMENT.** In the prosecution against an assignee of a claim which was resisted because filed more than three months after the first publication of the notice of assignment, it appeared that the assignee had made and filed a report, as required by Code, section 2120, and the report showed that the notice had been duly published. *Held* that this was *prima-facie* evidence of that fact, and that the court would take judicial notice of it without a formal tender of the report in evidence. *Id.*
4. **BELATED CLAIM : EQUITABLE RELIEF.** Under section 2126 of the Code, equitable relief cannot be granted to a creditor who fails to file his claim with the assignee within three months after the first publication of the notice of assignment. (*McKindley v. Nourse*, 67 Iowa, 121, *followed*.) *Id.*

ASSIGNMENT OF ERRORS.

See PRACTICE IN SUPREME COURT, 1, 2.

ATTACHMENT.

INTERVENTION IN : KIND OF PROCEEDINGS. See Practice in Supreme Court, 43.

ATTORNEYS AT LAW.

1. **MISCONDUCT OF IN ARGUMENT TO JURY.** See Practice and Procedure, 3, 4, 8.
2. **DUTY TO CITE DECISIONS.** See Practice in Supreme Court, 46.

ATTORNEY FEES.

See DIVORCE, 4 ; GUARDIAN, 2 ; HUSBAND AND WIFE, 1, 2 ; INTOXICATING LIQUORS, 30-32 ; PROMISSORY NOTE, 1.

BAIL.

See SURETIES, 1, 2.

BASTARDY.

ORDER AGAINST FATHER FOR SUPPORT: SUBSEQUENT VACATION: EFFECT. In a bastardy proceeding, the defendant pleaded guilty, and an order was made that he pay certain installments for the support of the child "until the further order of the court." Afterwards, in a supplementary proceeding by the father to recover the child with a view of supporting it himself, the custody was left with the mother, but the order to pay for its support was vacated. *Held* that this order was a proper one, in view of the fact that the father had recognized the child as his, and was, without any order to that effect, under obligations to support it. (See Code, secs. 1332, 2466). *State v. Hastings*, 574.

BILLS AND NOTES.

See PROMISSORY NOTES.

BILL OF EXCEPTIONS.

See PRACTICE AND PROCEDURE, 6, 7, 12, 13, 15.

BOARD OF EQUALIZATION.

See TAXATION, 1-3, 6.

BOARD OF SUPERVISORS.

See PAUPERS, 1; SURETIES, 1; TAXATION, 3, 6.

BONDS.

See CONSTABLE, 1; PROMISSORY NOTES, 2.

BOUNDARIES.

1. EVIDENCE AS TO CORNERS: NEW SURVEY. Positive and uncontradicted testimony of competent witnesses as to the location of original government corners, as seen by them; will prevail over the location of such corners as found by a re-survey. *Mills v. Penny*, 172.
2. ESTABLISHING LOST CORNER: EVIDENCE. Where the original monument which marked a corner has been obliterated, and its relocation is attempted by measurements from other corners, the most that can be said of the work, in any case, is that it is approximate. And upon consideration of the evidence in this case (see opinion), the report of the majority of the commission to locate the lost corner is approved, though the measurements on which the minority report is based correspond with the field-notes of the original survey. *Anderson v. Peterson*, 482.

BURDEN OF PROOF.

1. AS TO SELF-DEFENSE. See Criminal Law, 53.
2. AS TO INSANITY OF ACCUSED. See Criminal Law, 62.
3. AS TO CORRECTNESS OF GUARDIAN'S REPORT. See Guardian, 1.

See NEGLIGENCE, 3; PLEADING, 2; WILLS, 15.

CARRIERS OF PASSENGERS.

See RAILROADS, 27-31.

CASES IN THE IOWA REPORTS CITED, FOLLOWED, ETC.

[The figures immediately following the title of the case show the volume and page of the Iowa Reports where the case is found; the words in Roman type indicate the subject under consideration; and the figures following refer to the page in this volume where the citation is made.]

A

- Abbott v. Sartori*, 57, 661. Reports of liquors sold: Time of making. 268.
Adas v. Zangs, 41, 596. Right to jury: Condition: Constitutionality. 885.
Allender v. Chicago, R. I. & P. Ry. Co., 37, 264; 43, 276. Railroads: Duty to passengers in alighting. 789.
Anderann v. Kerr, 10, 233. Judgment: Includes interest. 437.
Applegate v. Winebrenner, 66, 67. Liquor nuisance: Who may prosecute. 486; Action for public good. 700.
Aullman v. Fuller, 58, 60. Equity jurisdiction: Partnerships. 91.
Aylsworth v. Chicago, R. I. & P. Ry. Co., 30, 459. Railroads: Fences: Duty to close gate opened by another. 209.

B

- Bailey v. Mut. Ben. Association*, 71, 689. Life insurance: Assessment plan: Action on policy. 42.
Baird v. Morford, 29, 536. Contributory negligence: Burden of proof. 101.
Baker v. Bohannon, 69, 62. Nuisance: Necessity as excuse. 172.
Barnes v. Marshall County, 56, 20. Judgment against county for tax withheld. 23.
Barr v. Hack, 46, 310. Slander: Evidence: Character of plaintiff. 320.
Bateman v. Sisson, 70, 518. Appeal: Less than one hundred dollars by remittitur. 218.
Bates v. Bates, 27, 110. Testamentary capacity. 358.
Beardsley v. Bridgman, 17, 290. Slander: Repetition: Pleading and proof. 564.
Bell v. Chicago, B. & Q. Ry. Co., 64, 321. Railroads: Defective fence: Presumption of knowledge. 209.
Bernhard v. Washington Life Ins. Co., 40, 442. Insurance: Waiver of conditions: Pleading. 15.
Bells v. City of Glenwood, 52, 124. Assignment of errors: Amendment: Time of filing. 38.
Bingham v. Foster, 37, 341. Verdict: Setting aside: Affidavit of juror. 439, 440.
Blaney v. Hanks, 14, 400. Fraudulent conveyance: Trust in grantee. 536.
Blair Town Lot & Land Co. v. Walker, 39, 406. Statute of frauds: Payment of another's debt. 669.
Blythe v. Blythe, 25, 266. Divorce: Subsequent alimony. 662.
Boardman v. Adams, 5, 229. Power of partner over firm property. 508.
Bonco v. Dubuque Street Ry. Co., 53, 280. Contributory negligence: Burden of proof. 101.
Bowman v. Toir, 3, 573. Written contract: Oral evidence to deny existence. 508.
Boyle v. Mallett, 67, 516. Appeal: Equity case: Record. 216.
Bradley v. Johnson, 67, 614. Assignment of errors: Exactness. 549.

- Bremer County Bank v. Bremer County*, 42, 394. Appeal from board of equalization: New trial. 126.
Brewer v. Stoddard, 49, 279. Guardian's report: Conclusiveness. 187.
Broquel v. Sterling, 56, 338. Tax deed: Action to redeem: Costs. 491.
Brown v. Allen, 35, 306. Chattel mortgage: Of crops to be raised: Validity. 526.
Brown v. Painter, 44, 368. Tax title: Failure: Recovery of taxes. 291.
Brown v. Rose, 55, 734. Assignment of errors: Right to amend. 37.
Bryan v. Chicago, R. I. & P. Ry. Co., 63, 465. Instructions: Stating issues. 366.
Bucklew v. Central Iowa Ry. Co., 64, 603. Constitutionality of section 1307 of the Code. 641.
Burdick v. Connell, 69, 458. Assessment to unknown owner. 221.
Burkhart v. Ball, 59, 630. Abstract not denied: Effect. 216.
Burnham v. Barber, 70, 87. Classifying property for assessment: Purpose. 265.
Burns v. Byrns, 45, 265. Adverse possession: Tenant in common. 363.
Bushnell v. Robison, 62, 541. Nuisance: Necessity as excuse. 172.

C

- Call v. Laramie*, 60, 212. Libel: Pleading: Special damages. 566.
Callanan v. Madison County, 45, 561. Recovery of taxes paid more than five years. 716.
Carter v. Sherman, 63, 694. Time for appeal: When begins to run. 296.
Case v. Dairs, 60, 442. Absolute grant: Repugnant conditions. 518.
Cassell v. Sherwood, 42, 623. County supervisors: Equalizing assessments. 285.
Cavender v. Heirs of Smith, 1, 306. Judicial sale: Inadequacy of bid. 227.
Center v. Spring, 2, 393. Malicious prosecution: Good faith: Instruction. 19.
Chamberlin v. Ingalls, 38, 300. Statute of frauds: Payment of another's debt. 669.
Cheadle v. Guttar, 68, 630. Saloon property: Liability for judgments. 276.
Cibula v. Pitt's Sons Manuf. Co., 48, 523. Jurisdiction: Effect of appearance. 434.
City of Burlington v. Quick, 47, 223. Special tax: Action to collect. 70.
City of Charlton v. Holliday, 60, 395. Special tax: Action to collect. 70.
Clark v. Ralls, 50, 275. Deed of land: Action on parol warranty. 447.
Cobleigh v. McBride, 45, 116. Liability of saloon property: Consent of owner. 168.
Collins v. Davis, 57, 256. Refunding of tax: Certiorari by taxpayer. 718.
Convey. In re Will of, 52, 197. Testamentary capacity. 358.

Cook v. Benson, 62, 170. Nuisance: Necessity as excuse. 172.
Cook v. City of Burlington, 59, 251. Taxation of corporation property. 183.
Cook v. Dillon, 9, 407. Fraudulent conveyance: Trust in grantee. 536.
Cooper v. Cent. R. R. of Iowa, 44, 188. Injury to brakeman: Violation of rules. 158; Negligence: Boarding moving car. 640.
Cowan v. Musgrave, 73, 884. Services of member of family: Compensation. 882.
Cowles' Adm'x v. Chicago, R. I. & P. Ry. Co., 82, 515. Verdict: Setting aside: Juror's affidavit. 440.
Crosby v. Elkader Lodge, 16, 399. Fraudulent conveyance: Trust in grantee. 536.
Cross v. Burlington & S. W. Ry. Co., 51, 683. Appeal: Challenging record after amendment. 888.
Cross v. Burlington & S. W. Ry. Co., 58, 62. Appeal: Certificate of judge after his term expired. 711.
Cross v. Garrett, 85, 486. Practice: Argument: Commenting on motion for continuance. 823.
Crouley v. Burlington, C. R. & N. Ry. Co., 65, 658. Code, sec. 1307: "Use and operation" of road. 640.
Cummings v. Easton, 46, 183. Tax sale: For taxes not carried forward. 109.
Cummings v. Tovey, 39, 195. Chattel mortgage: Description: Notice. 553.
Curran v. Excelsior Coal Co., 63, 94. Appeal: Less than one hundred dollars: Basis of jurisdiction. 544.

D

Daniels v. Langdon, 52, 741. Appeal: Equity case: Record. 216.
Davis v. Chicago, R. I. & P. Ry. Co., 40, 292. Railroads: Fences: Duty to close gate opened by another. 209.
Davis v. St. ohm, 17, 427. Title to real estate: Parol evidence of. 409.
De'any v. Reads, 4, 292. Judgment: Estops as to what. 247.
Dennison v. Phoenix Fire Ins. Co., 52, 457. Fire insurance: Breach of condition as to occupancy. 678.
Des Moines Water Co.'s Appeal, 48, 824. Taxation of corporation property. 183.
Dittos v. City of Danenport, 74, 66 (*ante*). Collection of special city taxes. 681.
Donaldson v. Miss. & Mo. Ry. Co., 18, 289. Contributory negligence: Burden of proof. 101.
Dorr v. Simerson, 73, 89. Stating issues to jury: Error without prejudice. 366.
Drake v. Chicago, R. I. & P. Ry. Co., 63, 802. Surface water: Adjoining landowners. 663; Measure of damages: Statute of limitations. 606.
Drake v. Jordan, 73, 707. Liquor nuisance: Attorney fees. 709.
Drake v. Kingsbaker, 72, 441. Liability of saloon property: consent of owner. 169.
Dryden v. Wyllis, 51, 534. Appeal: Amount in controversy. 437.
Dubuque Wood & Coal Ass'n v. City of Dubuque, 30, 184. Defective street: Injury: Proximate cause: Liability. 895.
Dudley v. Sautblne, 49, 650. Seller of liquor must know character of purchasers. 122.

Dunlavy v. Watson, 38, 402. Verdict: Setting aside: Affidavit of juror. 439, 440.
Dunleith & D. Bridge Co. v. Dubuque County, 55, 558. Appeal from board of equalization: New trial. 123.
Dunsmore v. Cent. Iowa Ry. Co., 72, 182. Nuisance: Necessity of railroad company. 171.
Dupont v. Downing, 6, 172. Justice of peace: Setting aside verdict. 232.

E

Eddy v. Hawkeye Ins. Co., 70, 472. Vacation of insured premises. 678.
Edgerly v. Farmer's Ins. Co., 43, 587. Waiver: Pleading: Evidence. 15.
Eikenberry v. Edwards, 67, 619. Contempt: Jury trial. 621.
Ellsworth v. Low, 62, 180. Possession as notice to vendee. 300.
Eshelman v. Chicago, R. I. & P. Ry. Co., 67, 296. Constitutional jury: What is. 385.
Executor of Griffith v. Carter, 64, 197. Tax title; Statute of limitations. 290.

F

Farley v. Chicago, R. I. & P. Ry. Co., 56, 337. Code, sec. 1307: "Use and operation" of road. 640.
Fauble v. Smith, 48, 462. Waiver: Pleading: Evidence. 15.
First Nat. Bank v. Carpenter, 34, 436. Partnership: Power of partner. 508.
Fisher v. Beard, 32, 352. Highway: Dedication: Evidence. 411.
Fitchpatrick v. Hawkeye Ins. Co., 53, 335. Waiver of conditions by insurance company. 432.
Fitzgerald v. McCarty, 55, 704. Instructions: Stating issues. 366.
Fogg v. Holcomb, 64, 621. Failure of title: Recovery of taxes paid. 291, 490; Occupying claimant: Remedy. 301.
Forbes v. Delashmull, 68, 164. Defect of parties: Practice. 390.
Frauden v. Chicago, R. I. & P. Ry. Co., 36, 372. Negligence: Boarding moving car, 640; Code, sec. 1307: "Use and operation" of road. 640.
Frost v. Parker, 65, 178. Appeal: Amending abstract: Leave: Time. 44.

G

Gardner v. Burlington, C. R. & N. Ry. Co., 69, 592. Negligence: Measure of damages. 101; Instructions: Not warranted by pleadings or proof. 427, 451.
Gardner v. Early, 69, 45. Tax title: Failure: Recovery of taxes paid. 300.
Garrigan v. Knight, 47, 525. Recovery of taxes paid on another's land. 161.
Gaylord v. Taft, 53, 757. Appeal: Equity case: Record. 216.
Ger. Am. Sav. Bank v. City of Burlington, 54, 609. Appeal from board of equalization: New trial. 126.
Getchell v. Supervisors of Polk County, 51, 107. County supervisors: Duty in equalizing assessments. 235.
Gilruth v. Gilruth, 40, 348. Will: Probate: How set aside. 463.
Goodnow v. Burrows, 74, 251 and 256 (*ante*). Former adjudication: Recovery of taxes paid by mistake. 259, 758.

Goodnow v. Litchfield, 59, 228. Failure of title: Recovery of taxes paid. 252 *et seq.*, 262.
Goodnow v. Litchfield, 67, 691. Recovery of taxes paid by mistake. 759
Goodnow v. Moulton, 51, 555. Former adjudication. 265; Failure of title: Recovery of taxes. 291.
Goodnow v. Wells, 67, 654. Recovery of taxes paid by mistake. 759.
Goodnow v. Stryker, 61, 261. Failure of title: Recovery of taxes paid. 252 *et seq.*, 258.
Green v. Austin, 7, 521. Contract: Construction. 599.
Greenleaf v. Ill. Cent. Ry. Co., 20, 48. Contributory negligence: Burden of proof. 101.
Greer v. Dick-y, 53, 755. Appeal: Equity case: Record. 216
Greve v. Camery, 69, 228. Will: Incorporation of paper by reference. 481.
Grimold College v. City of Davenport, 65, 635. Cities: Special tax: Notice to taxpayer. 69.
Grube v. Wells, 34, 148. Adverse possession. 173.

H

Haight v. City of Keokuk, 4, 199. Judgment: Estoppel as to what. 247.
Hall v. Carter, 74, 384 (*ante*). Instructions: Stating issues. 411.
Hall v. Robinson, 25, 93. Verdict: Setting aside: Grounds for. 439, 440.
Hallam v. Todhunter, 24, 166. Damages: Evidence: Prior agreement as to value. 402.
Ham v. Wisconsin, I. & N. Ry. Co., 61, 719. Evidence: Error cured by instructions. 665.
Hamilton v. Des Moines Valley Ry. Co., 38, 35. Verdict: Agreement to average. 666.
Harber v. Sexton, 66, 212. Payment of taxes: Evidence. 299.
Harney v. Supervisors Mitchell County, 44, 203. County supervisors: Duty in equalizing assessments. 285.
Harris v. Fremont County, 63, 639. Taxation: Jurisdiction of assessor. 717.
Harrison v. Sauerwein, 70, 292. Payment of taxes: Evidence. 299.
Hart v. Jackson, 57, 76. Appeal: Equity case: Record. 216.
Harwood v. Brownell, 48, 657. Tax sale: For taxes not carried forward. 109.
Hawes v. Burlington, C. R. & N. Ry. Co., 64, 318. Contributory negligence: Burden of proof. 101.
Heaton v. Knight, 63, 686. Assessment of land regarded as taxation. 221.
Hill v. Aullman, 68, 630. Instructions: Stating issues. 100.
Hill v. Holloway, 52, 678. Bill of exceptions: Incorporating evidence. 594.
Hiller v. Landis, 44, 224. Agreement of attorneys: Evidence. 339.
Hinkle v. Davenport, 88, 855. Slander: Repetition: Pleading and proof. 564.
Hintrager v. Hennessy, 46, 602. Tax title: Statute of limitations. 290.
Hintrager v. Traut, 69, 747. Tax title: Statute of limitations. 290.
Hodgin v. Toler, 70, 21. Will: Powers conferred on executors. 415.
Hollis v. State Ins. Co., 65, 454. Instructions: Stating issues. 366; Waiver of rights by adjusting agent. 431, 432.
Holmes v. Rudd, 11, 180. Judgment: Contradiction of recitals of. 296.
Holmes v. Hull, 48, 177. Appeal: Amount in controversy. 437.

Howland v. Knox, 59, 46. Fraudulent conveyance: Lien of creditor. 31, 676.
Hubbard v. Supervisors of Johnson County, 23, 130. Taxation of corporation property. 183.
Hughes v. Feeler, 23, 547. Redemption from execution sale: Time. 31.
Hull v. Alexander, 26, 569. Evidence: Refreshing memory. 693
Hutchinson v. Board of Equalization, 66, 35. Appeal from board of equalization: New trial. 126.

I

Ind. Dist. of Crocker v. Ind. Dist. of Ankeny, 43, 206. Assignment of errors: Time of filing. 37.
Ingersoll v. City of Des Moines, 46, 553. Appeal from board of equalization: New trial. 126.

J

Jaeger v. Evans, 46, 188. Default: Setting aside: Showing of merits. 351.
Jaffray v. Thompson, 65, 526. Evidence: Objections to: What considered on appeal. 327.
Jaquith v. Foyce, 42, 406. Prosecution under ordinance: Nature of. 370.
Jisk v. Ringgold County, 57, 630. Tax sale: For taxes not carried forward. 109.
Johnson v. Hardee, 45, 677. Value of land: Evidence: Contract price. 435.
Johnson v. Knapp, 36, 616. Contract for another's benefit: Action. 107; Statute of frauds: Payment of another's debt. 669.
Jordan v. Kavanaugh, 63, 152. Bond: Action on by interested stranger. 374.
Judge v. Flournoy, 74, 164 (*ante*). Liability of saloon property: Consent of owner. 169.
Judge v. Kribe, 71, 183. Nuisance: Injunction after cessation. 391.

K

Kearney v. Ferguson, 50, 72. Abstract not denied: Effect. 216.
Kelsh v. Town of Iversville, 68, 137. Constitutional jury: What is. 385.
Kendig v. Overhulser, 58, 195. Assignment of errors: Right to amend. 37.
King v. Stewart, 48, 334. Default: Setting aside: Showing of merits. 351.
Knapp v. Sioux City & Pac. Ry. Co., 63, 91. Defective street: Injury: Proximate cause: Liability. 395.
Kruidenier v. Shields, 70, 429. Verdict: On evidence not in case. 440.

L

Latham v. Myers, 57, 519. Guardian's report: Conclusiveness. 187.
Lathrop v. Brown, 23, 49. Fraudulent conveyance: Trust in grantee. 536.
Lathrop v. Central Iowa Ry. Co., 69, 109. Evidence: Error cured by instruction. 665.
Lees v. Wetmore, 58, 170. Will: Powers conferred on executors. 414.
Leighton v. Orr, 44, 680. Will: Probate: How set aside. 463.
Lindsay v. City of Des Moines, 68, 363. Defective sidewalk: Evidence. 113; Instructions: Stating issues. 366.

Lindsey v. Chicago, R. I. & P. Ry. Co., 64, 410. Negligence: Alighting from moving train. 785.
Littleton v. Fritz, 65, 488. Liquor nuisance: Action for public good. 700.
Littleton v. Harris, 73, 161. Liquor nuisance: Pleading: Denying residence of plaintiff. 539.
Livingston v. McDonald, 21, 172. Waters: Rights of upper owner. 663.
Loan v. Etzel, 62, 429. Liability of saloon property: Consent of owner. 168.
Lorieux v. Keller, 5, 196. Will: Validity: Disinheriting heir. 282.
Lormer v. Allen, 64, 723. Chattel mortgage: Of after-acquired property. 526.
Loughran v. City of Des Moines, 72, 382. Nuisance: Temporary: Damages. 171.
Lumbert v. Palmer, 29, 104. Waiver of conditions: Pleading. 15.

M

Macklot v. City of Davenport, 17, 379. Overassessment: Remedy. 285, 717.
Manderschid v. City of Dubuque, 29, 79. Highway: Dedication: Evidence. 411.
Manning v. Mathews, 66, 675. Railroad aid tax: Forfeiture by sale of road: Who may plead. 27.
Manuel v. Chicago, R. I. & P. Ry. Co., 56, 656. Negligence: Recovery limited by facts pleaded. 425.
Martin v. Bluntner, 68, 280. Liability of saloon property: Consent of owner. 165.
Martin v. Ragsdale, 49, 589. Innocent purchaser of land. 721.
Mast v. Pearce, 58, 579. Parol to add warranty to written contract. 310.
Marwell v. LaBrune, 68, 690. Abstract not denied: Effect. 216.
Mays v. Deaver, 1, 216. Bill of exceptions: Definition. 745.
McArthur v. Garman, 71, 84. Chattel mortgage: Of after-acquired property. 527.
McGregor v. Gardner, 16, 538. Appeal: Method of trial. 126.
McKindley v. Nourse, 67, 121. Assignment for creditors: Claim filed too late. 406.
McKnight v. Iowa & M. Ry. & Const. Co., 43, 46. Code, sec. 1907: "Use and operation" of road. 640.
McLenon v. Kansas City, St. J. & C. B. Ry. Co., 69, 320. Appeal: Less than \$100: Going back of certificate. 544.
McLeod v. Humeston & S. Ry. Co., 71, 138. Verdict: Setting aside: Grounds. 440.
McMillan v. Burlington & Mo. R. Ry. Co., 46, 231. Instructions: Evidence to support: Presumption. 310.
Meadows v. Hawkeys Ins. Co., 62, 389. Waiver: Pleading: Evidence. 15.
Meeker v. Meeker, 74, 352 (a. l. e.). Insanity: Weight of expert testimony. 534.
Mellen v. Ames, 39, 283. Fraudulent conveyance: Validity between parties. 31.
Meredith v. Phelps, 65, 118. Tax deed: Land taxed to unknown owner. 221.
Merrill v. Bows, 69, 653. Appeal: Certificate to evidence. 712.
Meyer v. Dubuque County, 43, 592. Overassessment: Remedy. 285.
Meyers v. Kirt, 57, 421; 64, 27. Liability of saloon property: Consent of owner. 165.

Muller v. Albaugh, 24, 128. Judgment: Vacation: Casualty. 569.
Miller v. Keokuk & Des M. Ry. Co., 68, 680. Nuisance: Damages: Abatement. 132.
Milner v. Gross, 66, 252. Appeal: Less than \$100 by remittitur. 218.
Mornyer v. Cooper, 35, 260. Judgment: Contradiction of recitals of. 298.
Morris v. Chicago, R. I. & P. Ry. Co., 45, 28. Railroads: Negligence after discovering danger. 590.
Morris v. City of Council Bluffs, 67, 343. Cities: Disposition of surface water. 664.
Morrison v. Hogue, 49, 574. Contract for another's benefit: Action. 107.
Morrison v. Marquardt, 24, 53. Highway: Dedication: Evidence. 411.
Morseman v. Yunkin, 27, 353. Taxation of corporation property. 183.
Mosier v. Vincent, 34, 479. Highway: Dedication: Evidence. 411.
Muldowney v. Ill. Cent. Ry. Co., 82, 178. Contributory negligence: Burden of proof. 101.
Murphy v. Black, 41, 488. Will: Incorporation of paper by reference. 481.
Murphy v. Chicago, R. I. & P. Ry. Co., 45, 663. Contributory negligence: Burden of proof. 101.

N

Negus v. Negus, 46, 487. Will: Validity: Disinheriting heir. 282.
Newman v. Cov. Mut. Ben. Ass'n, 72, 242. Life insurance: Assessment plan: Action on certificate. 423.
Nichols v. Dubuque & D. Ry. Co., 68, 782. Instructions not warranted by evidence. 451; Negligence: Alighting from moving train. 785.
Nickson v. Blair, 59, 531. Filing pleadings: What necessary. 725.

O

O'Donnell v. Chicago, M. & St. P. Ry. Co., 69, 102. Railways: Obstructing street crossing: Liability. 425.
O'Neil v. Keokuk & Des M. Ry. Co., 45, 547. Injury to brakeman: Violation of rules. 158, 388.
Onstott v. Murray, 22, 457. Highway: Dedication: Evidence. 411.
Ordway v. Suchard, 31, 481. Default: Setting aside: Negligence. 350.
Oschner v. Schunk, 46, 293. Assignment of errors: Exactness. 549.
Owen v. Owen, 22, 270. Instructions: Stating issues. 100.

P

Padden v. Moore, 58, 703. Filing pleadings: What necessary. 725.
Palo Alto County v. Harrison, 68, 84. Appeal: Amending abstract: Leave: Time. 44; Trial de novo: Evidence. 297.
Park v. C. & S. W. Ry. Co., 43, 636. Public nuisance: Private action. 131.
Patterson v. Burlington & M. R. Ry. Co., 38, 279. Contributory negligence: Burden of proof. 101.
Pelan v. DeBeard, 18, 53. Homestead right in leasehold. 687.
Perry v. Dubuque S. W. Ry. Co., 36, 102. Railroads: Defective fence: Presumption of knowledge: Gate left open by another. 209.

Phelps v. Kathron, 30, 231. Tender: Admits what. 438.
Polk County v. Hierb, 87, 331. Saloon property: Liability for judgments. 296.
Porter v. Briggs, 33, 166. Divorce: Wife's attorney fees: Husband's liability for. 49.
Porter v. Knight, 63, 366. Instructions: Stating issues. 366.
Potter v. Chicago, R. I. & P. Ry. Co., 46, 399. Instructions: Stating issues. 100.
Potter v. Phillips, 44, 333. Creditor's bill: Parties. 636.
Preston v. Johnson, 65, 235. Divorce: Wife's attorney fees: Husband's liability for. 49.
Price v. Mahoney, 24, 582. Contributory negligence: Burden of proof. 101.
Pyne v. Chicago, B. & Q. Ry. Co., 54, 223. Negligence: Boarding moving car. 640; Code, sec. 1307: "Use and operation" of road. 640.

E

Rayburn v. Central Iowa Ry. Co., 74, 637 (ante). Appeal: Record as to misconduct of counsel. 399, 648.
Read v. Howe, 49, 65. Recovery of taxes paid on another's land. 161.
Red v. Polk County, 56, 98. Criminal appeal: Costs: Liability of county. 541.
Reed v. Chicago, R. I. & P. Ry. Co., 57, 23. Instructions: Not warranted by evidence. 451.
Reynolds v. Hindman, 82, 148. Contributory negligence: Burden of proof. 101.
Rhodes v. DeBow, 5, 260. Justice of peace: Setting aside verdict. 232.
Richards v. Grinnell, 63, 44. Equity jurisdiction: Partnerships. 91.
Richardson v. Hoyt, 60, 70. Abstract not denied: Effect. 216.
Roberts v. Leon Loan & Adv. Co., 63, 76. Appeal: Challenging record after amendment. 398.
Rona v. Meier, 47, 607. Will: Construction: Repugnant clauses. 362.
Royce v. Jenney, 50, 676. Taxation: Power of supervisors in equalizing. 717.
Rusch v. City of Davenport, 6, 451. Contributory negligence: Burden of proof. 101.
Rush v. Carpenter, 54, 132. Contract: Construction. 599, 602.
Russell v. Johnston, 67, 279. Assignment of errors: Amendment: Time of filing. 38.
Rutledge v. Squires, 23, 58. Partnership: Power of partner. 508.

S

Sapp v. Aiken, 68, 701. Agreement of attorneys: Evidence. 339.
Sapp v. Walker, 66, 497. Possession as notice to vendee. 300.
Scharfenburg v. Bishop, 35, 60. Chattel mortgage: Of crops to be raised: Validity. 526.
Schrinper v. Heilman, 24, 506. Slander: Repetition: Pleading and proof. 564.
Schroeder v. Chicago, R. I. & P. Ry. Co., 47, 373. Code, sec. 1307: "Use and operation" of road. 640.
Skully v. Skully's Ex'r, 28, 548. Services of member of family: Compensation. 381.

Searing v. Berry, 58, 23. Sureties: Subrogation. 290.
Sexton v. Hawkeye Ins. Co., 69, 99. Fire insurance: Breach of covenant as to occupancy. 678.
Sexton v. Peck, 48, 251. Tax title: Failure: Recovery of taxes. 291.
Shear v. Kelson, 73, 705. Liquor nuisance injunctions: Removal to federal courts. 758.
Shiras v. Olinger, 50, 571. Nuisance: Necessity as excuse. 172.
Shirland v. Union Nat. Bank, 65, 96. Judgment: Estoppel. 247.
Sibley v. Bullis, 40, 429. Innocent purchaser of land. 721.
Sigerson v. Sigerson, 71, 476. Judicial sale: Inadequacy of price. 227.
Skinner v. Crawford, 54, 119. Adverse possession. 173.
Smith v. Foster, 44, 443. Statute of limitations. 290.
Smith v. Supervisors of Jones County, 30, 531. Board of equalization: Basis of action. 125.
Spiller v. Scofield, 43, 572. Possession as notice to vendee. 300.
Springer v. Bartle, 46, 638. Tax deed: Action to redeem: Costs. 491.
Stafford v. City of Uskaloosa, 57, 748. Instructions: No evidence to warrant. 451.
Starr v. City of Burlington, 45, 87. Appeal: Challenging record after amendment. 398.
State v. Bencke, 9, 203. Right of accused to jury trial. 371.
State v. Brainard, 25, 572. Instructions: Stating issues. 100, 411.
State v. Briggs, 68, 416. Filing papers: What sufficient. 61, 721.
State v. Brown, 16, 316. Exoneration of bail. 341.
State v. Carman, 63, 130. Waiver of jury trial by accused. 441.
State v. Clemons, 51, 279. Instructions as to degrees of offense. 538.
State v. Cloughly, 73, 628. Sale of liquors: Lawfulness: Burden of proof. 122.
State v. Courtney, 73, 619. Pharmacist: Permit to sell liquors: Repeal of statute. 274; Unlawful sales by: Liability. 275.
State v. Cowan, 74, 53 (ante). Verdict: Setting aside: Grounds for. 440.
State v. Cross, 68, 180. Expert testimony: Basis of hypothetical questions. 357; Homicide: Self-defense: Evidence. 653.
State v. Dakin, 52, 393. Continuance: Counter-affidavits. 200.
State v. Driscoll, 72, 583. Criminal evidence: Res gestae. 511.
State v. Felter, 23, 67. Criminal practice: Keeping jury together. 201.
State v. Fitzgerald, 49, 260. Married woman: Crime committed in husband's presence. 592.
State v. Fleak, 54, 429. Foreign judgment: Jurisdiction: Parol to deny. 94.
State v. Fowler, 52, 103. Indictment: Quashing: Incompetent evidence. 534; Homicide: Self-defense: Burden of Proof. 658.
State v. Freeman, 27, 333. Liquor nuisance: Indictment: Place. 611.
State v. Glynden, 51, 463. Instructions as to degrees of offense. 533, 534.
State v. Guisenhouse, 20, 227. Filing papers: What sufficient. 61.
State v. Haas, 22, 193. Liquor nuisance: What necessary. 233.

State v. Hale, 44, 96. Appeal from justice's court: Right of accused to change plea. 458.
State v. Harris, 27, 490. Liquor nuisance: Indictment. 239.
State v. Hayes, 67, 37. Unlawful sale of liquors: Mistake: Liability. 273.
State v. Hockett, 70, 452. Murder: Insanity: Evidence. 658.
State v. Hopkins, 65, 240. Larceny: Possession of goods: Burden of proof. 563.
State v. Jamison, 74, 613 (*ante*). Assault with intent: Evidence of successive assaults. 698.
State v. Jones, 64, 356. Murder: Insanity: Burden of proof. 547.
State v. Kraft, 10, 830. Appeal from justice's court: Right of accused to change plea. 452.
State v. Kraner, 50, 582. Exoneration of bail. 840.
State v. Kreig, 13, 462. Liquor nuisance: Indictment: Place. 611.
State v. Laffer, 38, 425. Liquor sold as medicines: Report to auditor. 271.
State v. Larrigan, 66, 426. Waiver by accused of jury trial. 441.
State v. Maher, 74, 77 (*ante*). Alibi: Evidence: Instructions. 88.
State v. Mallock, 70, 229. Criminal law: Right to be confronted with witnesses: Documentary evidence. 593.
State v. McCormick, 27, 402. Murder in first degree: Indictment. 530.
State v. McKies, 68, 382. Reports of liquors sold: Time of making. 268.
State v. McGinn's, 71, 685. Obtaining signature falsely: Delivery: Consummation of fraud. 615, 616.
State v. Merrihew, 47, 114. Change of venue: County a party. 838.
State v. Middleham, 62, 153. Criminal law: State need not call all its witnesses. 655.
State v. Miller, 53, 154. Evidence: Refreshing memory. 693.
State v. Mitchell, 53, 567. Highway: Prescription: Evidence. 403, 409.
State v. Morphy, 33, 276. Murder: Result of affray: Instruction. 656.
State v. Morris, 35, 272. Indictment: Quashing: Incompetent evidence. 584.
State v. Myers, 44, 580. Judicial act in vacation: Effect. 154.
State v. Nash, 7, 847. Reasonable doubt: Instructions. 706.
State v. Nash, 10, 82. Murder: Evidence: Statements of deceased. 655.
State v. Neeley, 20, 114. Homicide: Self defense: Evidence. 658.
State v. Newberry, 26, 467. Assault with intent to murder: Indictment. 531.
State v. Noel, 73, 682. Unlawful sales of liquors by pharmacist. 274.
State v. Oehlschlager, 39, 297. Appeal from justice's court: Right of accused to change plea. 453.
State v. Ostrander, 18, 435. Reasonable doubt: Instructions. 706.
State v. Peterson, 67, 564. Larceny: Possession of goods: Burden of proof. 563; Reasonable doubt. 658.
State v. Phippen, 62, 54. Indictment: Stating time of offense: Effect. 503.
State v. Pierce, 65, 85. Reasonable doubt: Instructions. 706.
State v. Porter, 34, 140. Homicide: Whether justifiable: Burden of proof. 657.
State v. Richart, 57, 245. Larceny: Possession of goods: Burden of proof. 563.

State v. Rollett, 6, 535. Indictment: Time of offense. 503.
State v. Sartori, 55, 340. Unlawful sale of liquor: Presumption as to intent. 121.
State v. Saunders, 68, 370. Criminal evidence: Similar offenses. 618.
State v. Schele, 52, 608. Assault with intent: Judgment for offense less than verdict. 532, 533.
State v. Schilling, 14, 455. Liquor nuisance: Indictment: Place. 611.
State v. Scott, 44, 93. Continuance: Counteraffidavits. 200.
State v. Shelton, 64, 333. Personal injury: Evidence: Opinion. 450; Inconsistent instructions. 533.
State v. Smouse, 49, 636, and 50, 45. Indictment: Surplusage. 504.
State v. Squires, 26, 346. *Ex post facto* laws. 504.
State v. Stagner, 72, 13. Continuance: Discretion of court. 199.
State v. Thompson, 74, 119 (*ante*). Pharmacist: Unlawful sales of liquors: Reports to auditor as evidence. 582.
State v. Tucker, 20, 508. Indictment: Quashing: Incompetent evidence. 584.
State v. Tucker, 68, 51. Abstract not denied: Effect. 216.
State v. Tweedy, 5, 437. Homicide: Whether justifiable: Burden of proof. 657.
State v. Vail, 57, 103. Prosecution under ordinance: Nature of. 370.
State v. Vinsant, 49, 243. Instruction as to degrees of offense. 533.
State v. Von Hallschuherr, 72, 541. Several counts in same language: Trial. 144.
State v. Walters, 45, 390. Criminal evidence: Other offenses. 504, 618.
State v. Watkins, 27, 415. Murder in first degree: Indictment. 530.
State v. Watrous, 13, 494. Indictment: Two counts: One offense. 659.
State v. Wells, 61, 629. Continuance: Counter-affidavits. 200.
State v. Whitcomb, 52, 85. Judgment: No jurisdiction: Void. 91.
Steele v. Central Iowa Ry. Co., 43, 109. Right to jury: Condition: Constitutionality. 385.
Sternburg v. Callahan, 14, 256. Partnership: Power of partner. 508.
St. Joseph Manuf. Co. v. Harrington, 53, 390. Justice of peace: Instructing jury. 232.
Swalls v. Cissna, 61, 693. Appeal: Less than \$100: Going back of certificate. 544.

T

Taylor v. Wendling, 66, 562. Evidence: Objections: What considered on appeal. 327.
Temp'lin v. Chicago, B. & P. Ry. Co., 73, 543. Railroads: Authority of president. 87.
Thomas v. Stetson, 62, 537. Partnership: Power of partner. 503.
Thorn v. Thorn, 14, 53. Homestead right of tenant in common. 687.
Tieman v. Haw, 49, 312. Officer: Oppressive acts: Action on bond. 744.
Tootle v. Phoenix Ins. Co., 62, 362. Bill of exceptions: Evidence. 594.

V

Van Orsdol v. Burlington, C. R. & N. Ry. Co., 56, 470. Obstructing water: Statute of limitations. 666.
Van Shaack v. Robbins, 33, 201. Innocent purchaser of land. 721.

Van Sickle v. Downs, 72, 624. Appeal: Less than \$100: Certificate. 146.
Vimont v. Chicago & N. W. Ry. Co., 71, 58. Negligence: Alighting from moving train. 785.

W

Wallace v. Berger, 25, 458. Judicial sale: Inadequacy of bid. 227.
Waller v. Davis, 59, 103. Partnership: Power of partner. 508.
Watson v. Riskumire, 45, 231. Incompetent testimony: Time to object to. 634.
Wells v. Burlington, C. R. & N. Ry. Co., 56, 520. Appeal: Challenging record after amendment. 388; Bill of exceptions: Evidence. 594.
Welsh v. Des Moines Ins. Co., 71, 337. Waiver: Pleading: Evidence. 15.
Westheimer v. Peacock, 2, 528. Statute of frauds: Payment of another's debt. 669.
Wheeler v. Becker, 68, 728. Chattel mortgage: Of crops to be raised: Validity. 528.
Whitcomb v. Whitcomb, 46, 437. Judgment: No jurisdiction: Void. 94.
White v. Smith, 54, 233. Evidence: Objection of incompetency: Effect. 185.
White v. Spanler, 68, 222. Instructions: Not warranted by evidence. 451.
Whitsett v. Chicago, R. I. & P. Ry. Co., 67, 150. Negligence: Question for jury. 785.

Wickersham v. Reeves, 1, 413. Redemption from execution sale: Time. 31.
Wilde v. Wilde, 36, 319: Divorce: Subsequent alimony. 682.
Wilson v. Palo Alto County, 65, 18. Appeal: Challenging record after amendment. 388.
Winkler v. Miller, 54, 477. Bona-fide purchaser. 298.
Winzer v. City of Burlington, 68, 279. Recovery of special tax after payment. 70.
Wright v. Howell, 85, 288. Fraudulent conveyance: Validity between parties. 31.
Wright v. Ill. & Miss. Tel. Co., 26, 195. Verdict: Setting aside: Juror's affidavit. 57, 439.

Y

Yahn v. City of Ottumwa, 60, 429. Mental capacity: Evidence: Opinions. 355.
Young v. St. Louis, K. C. & N. Ry. Co., 44, 172. Railroads: Failure to fence: Liability. 250.

Z

Zelle v. McHenry, 51, 572. Right to jury trial. 371.
Zigeeose v. Zigeeose, 69, 391. Easement: Prescription: Evidence. 403.

CERTIORARI.

See TAXATION, 6.

CHANGE OF VENUE.

See VENUE.

CHATTEL MORTGAGE.

1. **MADE TO DEFRAUD CREDITORS: ENFORCEMENT: EVIDENCE OF FRAUD IN DEFENSE.** Where a chattel mortgage is made without consideration, and solely for the purpose of defeating the creditors of the mortgagor, but ostensibly to secure a promissory note, and the property remains in the hands of the mortgagor, and the mortgagee attempts to enforce the mortgage by taking the property, the mortgagor may plead and show in defense the want of consideration and fraudulent character of the mortgage. Both parties in such case being guilty of the crime defined by section 4074 of the Code, the law will leave them where it finds them, and will not lend its aid to the consummation of the fraud by refusing to hear testimony, showing the fraudulent nature and intent of the transaction, to overcome the *prima-facie* case made by the mortgage itself. *Galpin v. Galpin*, 454.

2. **ON CRIBS OF CORN TO SECURE ADVANCES : CONSTRUCTION.** I. & M. were grain buyers at country towns, and bought and cribbed large quantities of corn with money advanced by D., S. & F., who were commission merchants in Chicago. As soon as a crib was filled, they would make to D., S. & F. a "crib receipt," or chattel mortgage, on the corn in that crib. Each of these "receipts" conveyed the corn, and provided as follows: "And, in further consideration of the advances made and to be made by said D., S. & F. for our account, we further agree, upon the request of D., S. & F., to procure said corn to be shelled and shipped to them, or their order, as they may direct, at our expense. * * * Said D., S. & F. to sell said corn, and, from proceeds of sale, pay freight, inspection, insurance, their advances on said corn, with interest at eight per cent. on the same, and upon margins upon contracts that may be made for its sale, and commissions of not less than one-half cent per bushel for selling, and account to us for balance of proceeds, if any. The conditions of this sale and transfer are such that, should the undersigned cause to be paid to the said D., S. & F., on or before the fifteenth day of June, 1881, all moneys and accounts due by the undersigned to the said D., S. & F., with interest * * * including commissions * * * on the above-described corn, and on other grain which we have agreed to consign to D., S. & F., or pay commissions on, then this sale and transfer shall be void." *Held—*
 - (1) That these receipts were not given merely as security for the money advanced to buy the corn in the particular crib described in the receipt, but that they were issued in pursuance of the general enterprise, which was to buy one hundred thousand bushels of corn, and sell it on the market; and each crib receipt was security for all advances made by the plaintiff, including margins advanced upon sales for future delivery.
 - (2) That the word "due" in the writing was not to be taken in its technical sense, but that I. & M. were liable to all indebtedness to plaintiffs, which they in good faith incurred in carrying out their part of the enterprise, whether due on the fifteenth of June, or afterwards; and that such indebtedness covered any proper outlay made necessary thereafter to protect them, or I. & M., from any legal contracts made for the sale of the corn. *Douglas v. Smith*, 468.
3. **CROPS NOT YET GROWN : VALIDITY.** A mortgage of crops to be grown in the future is valid. *Norris v. Hix*, 524.
4. **OF CROPS "GROWN" IN CERTAIN YEAR : MEANING.** A mortgage made in March, 1886, of "crops grown during the year 1886," will hold the crops afterwards raised in that year. *Id.*
5. **VALIDITY : OTHER SECURITY : LENIENCY TO MORTGAGOR.** In an action involving the validity of a chattel mortgage, evidence offered by defendant to prove that the mortgagee had other security, and that he had permitted the mortgagor to sell some of the chattels and convert the proceeds, was properly excluded as immaterial. *Id.*
6. **ENFORCEMENT BY MORTGAGEE : DEBT ASSIGNED : PARTIES.** The fact that the note secured by a chattel mortgage bears an assignment on its back will not defeat an action by the payee to enforce the mortgage, where it appears that the assignment was made to secure a debt which has been paid, and that the plaintiff is now the owner of the debt. *Id.*

7. **DEFECTIVE DESCRIPTION: GOOD AS TO CREDITORS WITH ACTUAL NOTICE.** While the record of a chattel mortgage which conveys "eleven Smith farm-wagons," without further designation or description, would not impart constructive notice to subsequent purchasers or creditors, yet, where the mortgagor had only eleven such wagons at the time, and ten of them were in controversy between the mortgagee and an execution creditor, and it appeared that the creditor and the sheriff who levied the executions had actual notice of the mortgage at the time of the levy, and that the mortgagee was claiming the property under it, *held* that the mortgage would hold the property notwithstanding the indefiniteness of the description. (Compare *Cummings v. Tovey*, 89 Iowa, 195). *Clapp v. Trowbridge*, 550.
8. ——— : **PAROL EVIDENCE TO AID.** In an action by a mortgagee of "eleven Smith farm-wagons" to recover ten of them from an officer who had levied upon them with actual notice of the mortgage and the mortgagee's claim thereunder, parol evidence was admissible to prove the number of wagons the mortgagor had in possession when the mortgage was given, and that those in controversy were of that number. *Id.*

See SALES, 2.

CHURCH.

See TRUSTS, 1.

CITIES AND TOWNS.

1. **DEFECTIVE SIDEWALK: CONTROL OF WALK.** In an action for an injury caused by a defective walk in the defendant town, an instruction to the effect that plaintiff could not recover unless he had shown that defendant had built the walk, or had assumed control of it, was properly refused; as the law presumes that it had actual control of the walk in the performance of the duties imposed by statute. *Shannon v. Tama City*, 22.
2. **INJURY ON DEFECTIVE STREET: CONTRIBUTORY NEGLIGENCE: INSTRUCTION.** In an action for an injury to plaintiff's wife caused by a defect in defendant's street-crossing, plaintiff asked the court to instruct the jury that knowledge on the part of his wife of the condition of the crossing, and that it was dangerous, would not prevent a recovery, if she exercised proper care while crossing the street. *Held* that it was not error to refuse this instruction, since every fact which would entitle plaintiff to recover was stated in an instruction given. *Larsh v. City of Des Moines*, 512.
3. ——— : **GRADE OF SIDEWALK: INSTRUCTION.** In such case, where the injury occurred while passing from the street to the sidewalk, it was not error to refuse to submit to the jury the question whether the defendant was negligent in not lowering the sidewalk to a level with the curb of the street, since, all through the court's instructions, the fact was kept prominent that, if the city should have constructed an apron or approach from the street, it should have been from the street to the sidewalk, and not merely to the end of the curb. *Id.*
4. **DEFECTIVE SIDEWALK: EVIDENCE.** In an action to recover for an injury caused by a defective sidewalk, evidence that the walk "tipped" or inclined to one side was material and competent, especially as the injury occurred at a time when it was covered with snow and ice. *Haskell v. City of Des Moines*, 110.

5. **DEFECTIVE SIDEWALK : INSTRUCTIONS.** In an action for an injury on a defective sidewalk, the court instructed that "the city is not an insurer of the safety of persons traveling upon its sidewalks." *Held* no error, when followed immediately by the words, "and is only liable when injuries are incurred without fault of the person injured, and because of negligence on the part of the city." *Lindsay v. City of Des Moines*, 111.
6. ——— : **DUTY OF CITY : INSTRUCTION.** In an action for an injury on a defective sidewalk the effect of one of the instructions was that the city could not be justified in keeping the walk in an "unreasonably dangerous" condition. *Held* that, while the language was not well chosen, it was not misleading, in view of the whole charge. *Id.*
7. **NEGLIGENCE IN CARE OF STREETS : INJURY BY FAST DRIVING : PROXIMATE CAUSE.** Plaintiff was driving slowly along a street-railway track on one of the defendant's streets, and was met, struck and injured by another vehicle which was driven at a dangerous and unlawful speed along the same track. The collision would have been avoided but for the fact that the track of the street railway had been allowed to become out of repair so that the rails were so much above the surface of the street as to prevent the parties from turning out. Conceding that the defendant was negligent in that regard in the care of its streets, and thus contributed to the injury, yet *held* that it was not liable, because the reckless driving of the person whose vehicle struck plaintiff's was the proximate cause. (Compare *Dubuque Wood & Coal Ass'n v. City of Dubuque*, 30 Iowa, 184, and *Knapp v. Sioux City & Pac. Ry. Co.*, 65 Iowa, 91). *DeCamp v. Sioux City*, 392.
8. **KEEPING STREETS IN REPAIR : RAILROAD BRIDGES.** An incorporated town is charged by the law with the duty of keeping its streets in proper condition for travel, and this obligation extends to a bridge built in the street by a railroad company, on its right of way, as an approach to a crossing of its track. Whatever obligation may rest upon the company to keep such approach in safe condition, the town still remains liable for negligence in that regard. *Fowler v. Town of Strawberry Hill*, 644.
9. **SEWER TAX : REGULARITY OF PROCEEDINGS.** While neither the resolution of the city council ordering the sewer in question, nor the one which assessed the tax therefor, in terms fixed the dimensions of the sewer, nor named the gross amount to be paid therefor, nor the amount of tax to be assessed against each tract of land and the owner thereof, yet, since the street through which the sewer was to be constructed, and the terminal points, were named, and the resolution assessing the tax ordered that it be assessed and levied on each lot, part of lot, or tract of ground, in the sum and to the amount shown by the plat of the city engineer, which plat showed the amount to be assessed to each square foot, the number of square feet in each tract of ground, and the total assessment to each tract of ground subject to be assessed for the sewer, *held* that this was sufficient to render the tax valid. *Dittoe v. City of Davenport*, 66.
10. ——— : **VALIDITY : NOTICE TO TAXPAYER.** Where it appears that notice to a taxpayer of the intended assessment and levy of a sewer tax would have been without advantage to him, such want of notice cannot avail as a defense against the collection of the tax. *Id.*

11. ——— : IRREGULARITIES : RIGHT OF ACTION TO COLLECT. Where a sewer has been constructed, and a tax therefor levied upon adjacent property, the city may recover such tax by action under sections 478, 479, of the Code, notwithstanding formal irregularities and defects in the proceedings, which do not affect the real merits of the case. (Compare *City of Chariton v. Holliday*, 60 Iowa, 895 ; *City of Burlington v. Quick*, 47 Iowa, 228). *Id.*
12. ——— : COLLECTION BY WRONG REMEDY : RECOVERY. One who, under protest, pays a sewer tax which he legally owes the city, cannot recover the same from the city on the ground that the remedy used to collect it was not the legal one. (*Winzer v. City of Burlington*, 68 Iowa, 279, *distinguished*). *Id.*
13. ——— : METHOD OF RECOVERY. Sections 478 and 479 of the Code provide a remedy for recovering taxes due a city for the construction of a sewer, which may be adopted at any time after the tax is due,—even after a suit has been brought by the taxpayer to recover such tax paid under protest. *Id.*
14. ——— : LIMIT OF TWO MILLS ON THE DOLLAR PER YEAR. A sewer tax levied on the real estate fronting on the street on which it is constructed is not invalid because it exceeds two mills on the dollar, and is to be collected in one year, as that limitation of the statute applies only where the city is divided into sewer districts, and where the tax is levied on the property in the district without regard to its location with respect to the sewer. *Id.*
15. COLLECTION OF SPECIAL TAXES : CODE, SECTION 481. Under section 481 of the Code, providing that municipal corporations, if by ordinance they so elect, may cause delinquent taxes levied for certain purposes to be certified to the county auditor, etc., such taxes may be so certified, and collected by the county treasurer, as directed in said section, even though the ordinance electing to pursue that method is passed after the work is done for which the tax is levied. (Compare *Ditloe v. City of Davenport*, ante, p. 66). *Shaw v. Des Moines County*, 679.
16. REGULATION OF STREET RAILWAYS : VESTED RIGHTS : VIOLATION OF INJUNCTION : PUNISHMENT : COSTS. By a former decree of this court, the city of Des Moines, the mayor and marshal thereof, and their successors in office, were enjoined from "interfering in any way with the construction, extension or operation, by animal power, of the plaintiff's line of street railway upon any of the streets of the city of Des Moines ; provided, this decree shall not be held to operate as a restraint upon the city of Des Moines of a proper police and equitable control over the streets of said city, and the power to make reasonable regulations as to the manner of construction of said lines, the places in the streets where the same shall be located, and the character and extent of service that shall be furnished thereon." The ordinance under which plaintiff's railway was built and operated did not designate the width of track to be adopted, but plaintiff adopted a narrow-gauge track and had operated it for fifteen years. Shortly after said injunction was issued, the city passed resolutions requiring the tracks of all street railways to be of the standard or broad gauge. Under these resolutions, the mayor and marshal of the city arrested, or caused to be arrested, employees of the plaintiff while engaged in laying down an extension of its narrow-gauge track on one of the city streets. *Held*—
 - (1) That the city did not have the power to require the plaintiff to use the broad gauge in extending its track.
 - (2) That the mayor and marshal were guilty of a violation of the injunction ; but

- (3) That, since they did the acts complained of only because they believed it to be their duty to do them under the resolutions and ordinances of the city, they should not be punished, except nominally, provided they will file with the clerk a written assurance that they will not again violate the injunction; but that they must pay the costs. *Des Moines St. Ry. Co. v. Des Moines B. G. St. R. R. Co.*, 585.

See NUISANCE, 1.

CODE.

See STATUTES CITED, CONSTRUED, ETC.

COMPENSATION OF OFFICERS.

See RAILROADS, 2.

COMPOSITION WITH CREDITORS.

See CONTRACT, 5.

CONSIDERATION.

See CONTRACT, 2, 3; SALES, 7; STATUTE OF FRAUDS, 1.

CONSTABLE.

OFFICIAL BOND: LIABILITY OF SURETIES FOR ACTS OF OPPRESSION: PLEADING. Action against a constable and his sureties on his official bond. The bond was in the form prescribed by statute (Code, sec. 674) and required the principal to "faithfully and impartially, without fear, favor, fraud or oppression, discharge all the duties * * * of his office." The action was for a breach of the conditions of the bond in unlawfully, maliciously and oppressively arresting, imprisoning and prosecuting the plaintiff. The petition averred that the acts complained of were done by the constable under color and by virtue of his office, but shows that they were unlawfully, maliciously and oppressively done, without probable cause. *Held*—

- (1) That the petition properly alleged a breach of the conditions of the bond.
- (2) That the sureties could not escape liability on the ground that the acts complained of were instigated wholly by private malice, and were in no way connected with the duties of their principal as constable. *Clancy v. Kenworthy*, 740.

CONSTITUTIONAL LAW.

1. VIOLATION OF INJUNCTION: COMMITMENT FOR CONTEMPT IN VACATION. When a judge is authorized by statute to perform a judicial act in vacation, his act, when so done, has the force and effect of an act done by the court (following *State v. Myers*, 44 Iowa, 580); and so, in this case, *held* that section three, chapter sixty-six, Laws of 1886, authorizing a judge in vacation to commit for contempt of an injunction issued under the prohibitory liquor law, is not in conflict with section one, article five, of the constitution, on the ground that it authorizes judgment by one who is not a court within the meaning of the constitution. *McLane v. Granger*, 152.
2. TRIAL BY JURY. See Criminal Law, 3, 4; Jury Trial, 1, 2.
3. RIGHT TO BE CONFRONTED WITH WITNESSES. See Criminal Law, 6.
4. TESTIFYING AGAINST ONE'S SELF. See Criminal Law, 13.

See INTOXICATING LIQUORS, 2; RAILROADS, 37; TAXATION, 4.

CONSTRUCTION.

See CHATTEL MORTGAGE, 2, 4; PRACTICE, 5; PROMISSORY NOTE, 2; SALES, 8; WILLS, 2, 9, 10, 18.

CONTEMPT.

See CITIES AND TOWNS, 16; CONSTITUTIONAL LAW, 1; JURY TRIAL, 2.

CONTINUANCE.

1. NO RULING ON MOTION: APPEAL. A continuance was asked on a showing of sickness, which was clearly insufficient. Afterwards additional affidavits were filed, but no ruling was made on the amended showing. *Held* that it could not be said that any error was in this committed by the court. *McReynolds v. McReynolds*, 89.
2. SICKNESS OF COUNSEL: DISCRETION OF COURT: COUNTER-AFFIDAVITS. See Criminal Law, 20, 21.

CONTRACT.

1. SPECIFIC PERFORMANCE: ORAL CONTRACT TO RECONVEY: EVIDENCE. Plaintiff claimed (1) that certain deeds, absolute on their face, made seventeen years before, were mortgages in fact, and (2) that defendant at the time orally agreed to reconvey to her when the debt was paid; but, having failed to establish the first proposition, *held* that she was in no position to ask for a specific performance of the alleged oral agreement. *Corliss v. Conable*, 58.
2. CONSIDERATION: SETTLEMENT OF CLAIMS. A settlement of conflicting accounts is a valid consideration for an agreement to pay a balance found due one of the parties. *Schaben v. Brunning*, 102.
3. GAMBLING CONTRACTS: SALES OF CORN FOR FUTURE DELIVERY. Where country grain buyers had a large quantity of corn in cribs, and they made sales from time to time, through Chicago commission merchants, for future delivery, of No. 2 corn, but, fearing that their corn would not grade No. 2, and hoping that it would improve with age, they bought in and resold, intending to deliver the corn to cover their sales, *held* that the transactions were not illegal, so as to defeat their brokers in the collection of margins advanced for them. *Douglas v. Smith*, 468.
4. BILL OF SALE: DELIVERY. A bill of sale made to secure a claim is delivered to the owner of the claim by delivery to his attorneys authorized to secure the claim. *Brewster v. Reel*, 506.
5. COMPOSITION WITH CREDITORS: PAYMENT: TENDER. An insolvent debtor entered into an agreement with his creditors to pay them fifty per cent. of their respective claims, which they agreed to accept in full satisfaction. In a subsequent action to recover the full amount of one of these claims, the defendants offered evidence to show that the fifty per cent. stipulated for in the contract had been placed on deposit in a certain bank, and that their attorney had advised plaintiff's attorney of that fact, and that the money would be paid upon his depositing in the bank his client's receipt acknowledging satisfaction in full of the claim. *Held* that this evidence was properly excluded, because it did not tend to show an unconditional offer to pay as provided in the agreement; and that, since defendants had neither performed nor offered to perform their part of the contract, judgment was properly rendered for the full amount of the claim. *Melhop v. Tathwell*, 571.

6. **UNDUE INFLUENCE : RESCISSION.** See Conveyance, 1.
7. **PAROL TO CHANGE WRITING.** See Evidence, 4, 6.
8. **FOR CONTRACTS OF PARTICULAR KINDS,** see appropriate titles.

CONVEYANCE.

1. **FATHER TO CHILDREN : UNDUE INFLUENCE : RESCISSION.** The facts in this case examined (see opinion) and *held* to show that conveyances made by an aged father to his children were procured by undue influence, and through a groundless fear on his part that he was about to be involved in litigation through which he might lose his property. Accordingly, the decree of the district court for a reconveyance of the property is affirmed. *Norton v. Norton*, 161.
2. **PROCURED BY FRAUD : RESCISSION.** See Fraud, 1.

See DEED.

CORPORATIONS.

POWER OF PRESIDENT. See Railroads, 1.

See JUDICIAL SALE, 2 ; MUNICIPAL CORPORATIONS.

COSTS.

1. **OF UNNECESSARY WITNESSES.** It is not error to refuse to tax to the successful party the costs of witnesses subpoenaed by him, merely because they have not been used for any material purpose. *Hanners v. McClelland*, 318.
2. **IN CRIMINAL CASE : MADE BY DEFENDANT ON APPEAL : LIABILITY OF COUNTY.** Where an indictment was found in one county, and a judgment of conviction was had in another county on a change of venue, and defendant appealed to this court, and the judgment was reversed and the cause remanded, *held* that an order taxing to the county where the trial was had the costs made by defendant on appeal was without authority of any statute, and was void, and should therefore have been set aside upon motion of such county. (Compare *Red v. Polk County*, 56 Iowa, 98). *State v. Rainsbarger*, 539.
3. ——— : **TAXATION TO COUNTY : WHO MAY APPEAL.** The state, which is plaintiff in a criminal case, and the county to which costs therein are taxed, are both entitled to appeal from the order taxing the costs to the county, and the defendant cannot have one of the appeals dismissed when it does not appear that he will be prejudiced by allowing them both to stand. *Id.*
4. **TAXATION : EXCEPTIONS.** Exceptions duly taken to an order overruling a motion to retax costs bring up the question as to whether they were properly taxed, without any exception to the order taxing the costs. *Id.*

See TAX SALE AND DEED, 12 ; WILLS, 8.

COUNTIES.

1. **LIABILITY FOR COSTS ON APPEAL OF CRIMINAL CASE.** See Costs, 2, 3.
2. **LIABILITY FOR TAXES COLLECTED IN AID OF RAILROADS.** See Railroads, 3, 5.

COUNTY TREASURER.

COMMISSION ON TAXES IN AID OF RAILROADS. See Railroads, 2.

CRIMINAL LAW.

1. **EVIDENCE BEFORE GRAND JURY NOT MINUTED : DOCUMENTS.** *It is not necessary that documentary evidence used before the grand jury be set out or noted in the minutes of the evidence. And where a witness before the grand jury, as shown by the minutes, testifies only that he is the officer having legal custody of such documents, he may, upon the trial, after testifying that he is such officer, produce and identify such documents; such identification not being independent evidence, but connected with the documents themselves. State v. Mullenhoff, 271.*
2. **INDICTMENT: SETTING ASIDE : INSUFFICIENT EVIDENCE.** *An indictment cannot be assailed upon motion on the ground that it is not sustained by sufficient evidence. State v. Smith, 580.*
3. **RIGHT TO JURY TRIAL IN SUPERIOR COURT.** *Since in the present condition of the law there is no appeal from the superior court of a city except to the supreme court, held that one charged in the superior court, upon information, with the violation of a city ordinance is entitled to a trial by jury in that court; and if, when the case matures for trial, the jury has been discharged for the term, and the defendant demands a jury trial, it is the duty of the court to continue the case on its own motion until such time as a jury can be lawfully empaneled. (See opinion for statutes construed and cases cited). City of Creston v. Nye, 369.*
4. **APPEAL FROM JUSTICE'S COURT: POWER OF DEFENDANT TO WAIVE JURY TRIAL.** *Where one has been tried and convicted upon an information in a justice's court, and he appeals to the district court, he has the power to waive trial by jury in the appellate court, and to submit to a trial by the court; and where he does so, and is so tried, and is found guilty, and judgment is rendered against him, he cannot afterwards insist that the court had no right to try him without a jury. (State v. Carman, 63 Iowa, 130, and State v. Larrigan, 63 Iowa, 426, in which cases the trials were on indictments, distinguished). State v. Ill, 441.*
5. **APPEAL FROM JUSTICE'S COURT: RIGHT TO CHANGE PLEA.** *One who has, in a justice's court, pleaded guilty to a charge of assault and battery, may, on appeal to the district court, withdraw that plea, and plead guilty of assault only, or not guilty—following cases cited in opinion. State v. Furlee, 451.*
6. **RIGHT TO BE CONFRONTED WITH WITNESSES : PROCEEDINGS BEFORE GRAND JURY : DOCUMENTARY EVIDENCE.** *The constitutional right of one accused of a crime to be confronted with the witnesses against him does not relate to investigations by the grand jury, nor does it have any reference to documentary evidence in any case. (See State v. Matlock, 70 Iowa, 229). State v. Smith, 580.*
7. **LIABILITY OF WIFE FOR ACTS DONE IN HUSBAND'S PRESENCE : PRESUMPTION OF COERCION : EVIDENCE TO REBUT.** *The law presumes that the influence of a husband over his wife is such that she is not held criminally liable for unlawful acts done by her in his presence, unless there is evidence to rebut this presumption, and satisfy the jury that she was exercising a free volition and was guilty of an independent criminal act; and the mere fact that she attempts to conceal her husband's crime does not make her a party to it, but evidence of such efforts on her part may be considered as bearing upon her guilt or innocence of the crime. (Compare State v. Fitzgerald, 49 Iowa, 260). State v. Kelly, 589.*

8. **MURDER BY HUSBAND : COMPLICITY OF WIFE : EVIDENCE.** The evidence in the case considered (see opinion), and *held* that it was not sufficient to sustain a verdict of manslaughter,—it not appearing therefrom that, when the murder was committed by defendant's husband, she, if present, took any part therein either by word or act ; or, if she did, it did not rebut the presumption that she was coerced by her husband. *Id.*
9. **REASONABLE DOUBT : INSTRUCTIONS.** The court, at the end of an instruction, otherwise unexceptionable, on the question of reasonable doubt, added these words : “ If you are then not so satisfied and convinced of the defendant's guilt that you would act upon that conviction in matters of highest importance to yourselves, you should give the defendant the benefit of the doubt, and acquit ; if you are so satisfied, you should convict him.” *Held* that in these words there was no error. (*State v. Nash*, 7 Iowa, 347, and *State v. Ostrander*, 18 Iowa, 435, *followed* ; and *State v. Pierce*, 65 Iowa, 85, *distinguished*). *State v. Schaffer*, 704.
10. **EVIDENCE : STATEMENTS OF DECEASED WITNESS BEFORE GRAND JURY.** A grand jury which sat prior to the one which found the indictment in this case made inquiry as to who committed the crime charged herein, but found no indictment. At that inquiry one H., who died before the trial, was present as a witness and gave testimony, but no attorney for the state was present. The defendant in this case sought to prove by a member of that former grand jury what H. said in his testimony. *Held* that the offered evidence was properly excluded. Whether the case would be different, had the attorney for the state been present when the testimony was given, *quaere*. *State v. Porter*, 623.
11. **EVIDENCE : CONTRADICTORY STATEMENTS OF WITNESS OUT OF COURT : INSTRUCTION.** Defendant was charged with an assault with intent to commit murder. His wife gave evidence on the trial tending to prove that he acted in self-defense. In rebuttal the state introduced evidence of statements made by her before the trial, which were inconsistent with her testimony, and which, if true, showed defendant to have been the aggressor. *Held* that such rebutting evidence was admissible only as affecting the credibility of the witness, and that an instruction (see opinion) from which the jury might infer that it was to be considered in determining the question of self-defense was erroneous. *State v. Davis*, 578.
12. **EVIDENCE : RES GESTAE : WHAT IS NOT.** Where a woman had been shot, but had had her wound dressed, and had lain down upon a sofa, and then, in response to one seeking information, she related with particularity and at length circumstances occurring, and conversations between her and defendant had before the wound was given, and stating that defendant was drunk at the time and purposely shot her, *held* that evidence of the statements so made was not admissible as being of the *res gestae*. (*State v. Driscoll*, 72 Iowa, 583, *distinguished*). *State v. Deuble*, 509.
13. **EXAMINATION OF DEFENDANT BY COURT.** A defendant is not required to testify against himself ; nor can he legitimately be placed in the position of admitting or denying, in the presence of the jury, in answer to questions put by the court, anything having a material bearing on his guilt. *State v. Merkley*, 695.
14. **WITNESS NOT EXAMINED BEFORE GRAND JURY.** The state offered on the trial a witness who had not been before the grand jury. She had written a statement of what she would testify to, and sent that to the grand jury, and the same was attached to the indictment, and purported to be evidence taken before the grand jury ; and her name was indorsed on the back of the indictment. *Held* that the admission of her testimony was error, under section 4421 of the Code. *State v. Porter*, 623.

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15. **PRACTICE: SETTING DAY FOR TRIAL: DISCRETION OF COURT.** The time during the term at which a defendant shall be put upon his trial rests wholly in the sound discretion of the judge, and unless an abuse of such discretion, with prejudice to the defendant, be shown, as is not done in this case, this court will not interfere. *State v. Maher*, 77.
16. ——— : **ORDER OF EVIDENCE TO REBUT ALIBI.** Where defendant had sought to establish an *alibi*, it was proper to admit, in rebuttal, testimony tending to show defendant's presence at the time and place of the crime, in support of evidence given in chief on that point. *Id.*
17. ——— : **INSTRUCTION AS TO USE OF EVIDENCE.** Where counsel for defendant offered certain evidence for a certain stated purpose, but the court excluded it for that purpose, but admitted it for another purpose, it was not error to instruct the jury to consider it only for the purpose for which it was admitted. *Id.*
18. ——— : **ALIBI: EVIDENCE: INSTRUCTIONS NOT CONTRADICTORY.** The court instructed that the *alibi* relied on as a defense must be established, if at all, by a preponderance of the evidence; also, that if upon the whole evidence, including that tending to establish the *alibi*, they entertained a reasonable doubt, they should acquit. *Held* that these instructions were not contradictory or misleading, but that they were harmonious and correct. *Id.*
19. ——— : ——— : **INSTRUCTIONS AS TO EVIDENCE.** The court instructed as follows: "The defense of *alibi*, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place, so far away or under such circumstances, that he could not, with ordinary exertion, have reached the place where the crime was committed, so as to have participated in the commission thereof;" and "If the proof of *alibi* fails to show as to either defendant on trial, you will not consider it as to him; but if it does show as to either, you will give it full consideration as to the defendant of whom it so shows." *Held* that the instructions rightly stated the law, and were not subject to the objection that they directed the jury not to consider the evidence pertaining to the *alibi*. *State v. Maher*, 77, 82.
20. **PRACTICE: CONTINUANCE: SICKNESS OF DEFENDANT'S COUNSEL: DISCRETION.** A motion by defendant in a criminal case for a continuance, based on the alleged illness of some of his counsel, is addressed to the discretion of the trial court; and the ruling of such court will not be reversed on appeal, unless it is made to appear that such discretion has been abused, with prejudice to defendant; and the facts of this case (see opinion) show neither abuse of discretion nor prejudice. *State v. Rainsbarger*, 196.
21. ——— : ——— : **COUNTER-AFFIDAVITS.** While it is true that an application for a continuance, based on the absence of a witness, may not be resisted by counter-affidavits contradicting the statement of facts which it is alleged the witness will swear to (*State v. Dakin*, 52 Iowa, 395; *State v. Scott*, 44 Iowa, 93), the rule is entirely different as to the statement of facts showing diligence, and the like: and, as to these, counter-affidavits are admissible. (Compare *State v. Wells*, 61 Iowa, 629). *Id.*
22. ——— : **KEEPING JURY TOGETHER: DISCRETION OF COURT.** A request, by defendant on a criminal charge, that the jury be placed in the care of officers, and be not permitted to separate, is addressed to the sound discretion of the trial court (Code, sec. 4434; *State v. Felter*, 25 Iowa, 67); and, before the action of the court in refusing such request will be interfered with on appeal, abuse of such discretion must be shown, and prejudice resulting therefrom; which is not done in this case. (See opinion for facts). *Id.*

23. ——— : USING WITNESS NOT NAMED ON INDICTMENT : NOTICE TO DEFENDANT : SUFFICIENCY. The state was permitted to examine a witness whose name was not endorsed upon the indictment, as required by Code, section 4293, upon showing notice to defendant as required by Code, section 4421; but the notice stated the residence of the witness to be Kansas City, Kan., whereas it proved to be Kansas City, Mo.; and the statement in the notice of what the state expected to prove by the witness varied somewhat from what was actually proved by him. But *held* that this was no ground for reversal, since it does not appear that defendant was in any manner prejudiced by the irregularities. (See Code, sec. 4538). *Id.*
24. JOINT INDICTMENT : SEPARATE TRIALS : DISCRETION OF COURT. It is within the discretion of the trial court to grant or refuse separate trials to defendants jointly indicted, where the offense charged is less than a felony. (Code, secs. 4012, 4424). *State v. Kirkpataick*, 505.
25. ALIBI : INSTRUCTION. Where there is evidence tending to establish an *alibi*, a proper instruction in relation thereto should be given, especially when asked. *State v. Porter*, 623.
26. ELECTION BY STATE TO RELY ON DIFFERENT ACTS ON SUCCESSIVE TRIALS. Where upon prior trials the state has elected to rely for conviction on one of two or more acts which the evidence tended to prove, it may, on a subsequent trial,—the verdicts of conviction having been set aside and new trials awarded,—elect to rely for conviction upon evidence tending to prove another act different from the act found by the prior verdicts; and this is not permitting the state to prove an offense other than that for which the defendant was before tried, but only to prove the same offense by other evidence. So *held*, in a prosecution for the unlawful sale of intoxicating liquors, where the evidence tended to prove several sales, each of which would have supported a verdict of guilty, and the state, on the last trial, elected to rely on the evidence establishing a sale different from the one relied on in the former trial. *State v. Dow*, 141.
27. TRIAL : USING WITNESSES BEFORE GRAND JURY. There is no obligation resting upon the state to use upon the trial all the witnesses examined before the grand jury, and evidence of a failure so to do is not admissible to show the *animus* of the prosecution. (Compare *State v. Middleham*, 62 Iowa, 153). *State v. Dillon*, 653.
28. JURY TRIAL : VERDICT BY AGREEMENT. The defendant on a charge of larceny pleaded not guilty, and a jury was empaneled. Thereupon, by agreement between the district attorney and defendant, the jury returned a verdict of guilty. *Held* that this was equivalent to an admission by defendant of his guilt in open court and in the presence of the jury, and that the verdict could not be disturbed on the ground that it was not the result of a trial by jury. *State v. Keegan*, 145.
29. PRACTICE : SEALED VERDICT : JURORS ABSENT. Where on a trial for misdemeanor the parties agree to a sealed verdict, and when such verdict is received the defendant makes no objection that some of the jurors are absent, and does not demand that the jury be polled, he waives the error, if any, in receiving the verdict in the absence of some of the jurors. *State v. Thompson*, 119.
30. CONVICTION ON BAD COUNT. Where a defendant has been convicted of a crime charged in two counts, and, on appeal, one of the counts is found to be bad, and it cannot be said on which count he was found guilty, the judgment must be reversed. *State v. Merkley*, 695.

81. **ASSAULT WITH INTENT TO MURDER: REQUISITES OF INDICTMENT.** The elements of the crime of assault with intent to commit murder are (1) the assault; (2) the specific intent to kill; and (3) malice aforethought; and an indictment which charges these is sufficient, even though the facts alleged are not such that, if death had resulted, the crime would have been murder in the first degree. *State v. Keasling*, 528.
82. ——— : **VERDICT OF GUILTY AS CHARGED · SENTENCE FOR LESSER OFFENSE.** In such case, where the verdict was guilty of the offense charged, but the court was of the opinion that malice aforethought had not been proved, but that the other elements of the offense had been, constituting the crime of assault with intent to commit manslaughter, the defendant was not on that ground entitled to a new trial, but was properly sentenced for the lesser included offense. (*State v. Schele*, 52 Iowa, 608, *followed*). [ROBINSON, J., *dissenting*, and SEEVERS, C. J., thinking this point not necessarily involved, neither concurring nor dissenting.] *Id.*
83. ——— : **SELF-DEFENSE: RIGHT AND WRONG RULE STATED IN INSTRUCTION: NEW TRIAL.** In this case, in a lengthy instruction, the court, in one part of it, erroneously laid down the rule that the right to take life, or to resort to the use of a deadly weapon in resistance of an assault, depends on whether the assault is in fact felonious, and the danger actual and urgent. In another part the correct rule was stated. *Held* that the verdict of guilty should be set aside, because it cannot be known which rule the jury followed. (*State v. Shelton*, 64 Iowa, 838, *followed in principle*). *Id.*
84. ——— : **REFUSING TO NOURISH CHILD: INDICTMENT;** An indictment for an assault with intent to kill an adopted daughter of defendants, of eleven years of age, by neglecting and refusing to nourish her, is insufficient, where it fails to charge that defendants had the means and were pecuniarily able to provide for her. *State v. Merkley*, 695.
85. ——— : **EVIDENCE OF SUCCESSIVE ASSAULTS.** On a trial for assault with intent to murder, although the indictment charges only one offense, the state may prove successive offenses of the kind charged, for the purpose of establishing the intent. (Compare *State v. Jamison*, *ante*, p. 613). *Id.*
86. **EMBEZZLEMENT: EVIDENCE WARRANTING CONVICTION.** The defendant, who had been county treasurer, was indicted for embezzling the funds of the county. The deficiency, and efforts to conceal the same by fraudulent vouchers and entries, were proved or admitted, but defendant sought to shift the responsibility from himself to another, but the jury found against him on that issue. *Held* that there was no such want of evidence to sustain the verdict as to justify this court in setting it aside. *State v. Cowan*, 53.
87. ——— : **INDICTMENT: NATURE OF EMPLOYMENT.** The indictment in this case was found under section 8909 of the Code, which reads as follows: "If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of a copartnership, or if any person over sixteen years of age, embezzle and fraudulently convert to his own use, without the consent of his employer or master, any property of another which has come into his possession by virtue of such employment, he is guilty of larceny, and shall be punished accordingly." *Held* that it was not necessary to allege the particular nature or character of defendant's employment, but that it would have been sufficient to allege generally that he was in the employment of the person named, as clerk, agent or servant. And if, having alleged in the indictment that defendant's employment was of a special character, the prosecution was bound to aver that the money came into his hands by virtue of such special employment, *held* that the indictment (for which see opinion) was not deficient in that regard. *State v. Jamison*, 602.

38. ——— : ——— : CHARGE OF FRAUDULENTLY CONVERTING. In such case, where the indictment charged that defendant "fraudulently embezzled and converted to his own use" the money, *held* that it was not open to the objection that it did not charge that defendant fraudulently converted the money. *Id.*
39. FORGERY : INDICTMENT : VARIANCE. Where the forged instrument was dated January 7, 1885, but the copy set out in the indictment showed it to be dated January 7, 1884, the court properly instructed that the variance was immaterial. *State v. Blanchard*, 628.
40. ——— : PLACE OF CRIME : EVIDENCE. The fact that the forged instrument purported to have been executed in Mitchell county, and that defendant had it in his possession in that county at about the time it purported to have been executed, was competent evidence, and, in the absence of anything to the contrary, sufficient, to prove that the forgery was committed in that county. *Id.*
41. FRAUDULENTLY OBTAINING SIGNATURE : DELIVERY TO AGENT : INDICTMENT. Where one is indicted, under section 4073 of the Code, for obtaining by false pretense, and with intent to defraud, the signature of a person to a written instrument the false making of which would be punished as forgery, it is necessary to allege the delivery of the instrument signed (*State v. McGinnis*, 71 Iowa, 685); and where the indictment charged that defendant was a loan agent employed to make a loan to S., and in the transaction fraudulently procured the signature of S., and that S. delivered the instrument to defendant, *held* that the indictment did not allege that defendant was the agent of S., and it was not, therefore, open to the objection that it did not charge a delivery of the instrument, on the ground that a delivery to an agent is no delivery. *State v. Jamison*, 618.
42. ——— : MORTGAGE : INDICTMENT : AVERMENT OF OWNERSHIP OF LAND. To fraudulently obtain the signature of a party to a mortgage containing the ordinary covenants is an offense under section 4073 of the Code. And an indictment which sets out a copy of the mortgage showing the covenants is not bad because it fails to allege that the person whose signature was fraudulently obtained owned the land. *Id.*
43. ——— : ACTUAL DEFRAUDING NOT NECESSARY. In such case, while there must be a delivery of the instrument signed in order to consummate the intent to defraud, the actual consummation of the intended fraud need not be shown. *Id.*
44. ——— : EVIDENCE OF SIMILAR OFFENSE. In such case, since the gist of the alleged crime is the *intent*, evidence of the commission of another similar crime against the same person was admissible as bearing only on the question of intent. (Compare *State v. Walters*, 45 Iowa, 389, and *State v. Saunders*, 68 Iowa, 370). *Id.*
45. ——— : EVIDENCE : CHANGING PAPERS TO CONCEAL CRIME. In such case, evidence tending to show that defendant altered papers pertaining to the alleged fraudulent transaction for the purpose of concealing the fraud was competent and material. *Id.*
46. KEEPING HOUSE OF ILL FAME : INDICTMENT : SURPLUSAGE : PROOF. The indictment in this case charged defendant with keeping a house of ill fame, to which he permitted persons to resort for purposes of prostitution and lewdness; also that, at his solicitation and request, prostitution and lewdness were practiced in said house. *Held* that the latter allegation was mere surplusage, being only matter of evidence, which it was not necessary to prove. *State v. Schaffer*, 704.

47. ——— : EVIDENCE TO SUPPORT VERDICT. The evidence justified the jury in finding that defendant's house was frequently resorted to by lewd women, who were there visited by men, but there was no direct evidence of lewd practices on the premises. Neither was there any direct evidence that defendant knew of the purposes of those who frequented his house, and he testified that he knew of no lewd practices there. But the jury were warranted in finding that he knew the character and reputation of the women whom he permitted to frequent the house. *Held* that this court could not set aside the verdict of guilty for want of evidence to support it. *Id.*
48. LARCENY : POSSESSION OF GOODS : EVIDENCE TO OVERCOME PRESUMPTION. Where, on a trial for larceny, the state shows that the defendant had the stolen property in his possession soon after the larceny, it is not necessary, in order to overcome the presumption of guilt thus arising, for defendant to establish to the satisfaction of the jury that he did not steal the property ; but he is entitled to an acquittal if his evidence is such as to raise a reasonable doubt as to whether he did not come by it honestly. (See opinion for cases followed and distinguished). *State v. Manley*, 561.
49. MURDER : EVIDENCE : STATEMENTS OF DECEDENT. After the decedent had received his fatal wound, the defendant and another were brought before him, and he then stated that defendant was the man who wounded him. *Held* that evidence of this statement was admissible to show the demeanor of the defendant when accused by the deceased. (Compare *State v. Nash*, 10 Iowa, 82). *State v. Dillon*, 658.
50. ——— : ——— : NATURE OF WOUND : DEFENDANT'S KNOWLEDGE. Evidence that defendant was informed of the nature of decedent's wound shortly after it had been received *held* properly excluded when offered by defendant. *Id.*
51. ——— : ——— : WOUNDS UPON DEFENDANT. When defendant claimed that the fatal wound was given in an affray in which he had been knocked down, receiving certain injuries, evidence that no wounds were found upon him when arrested was admissible. *Id.*
52. ——— : RESULT OF CONTINUED AFFRAY : INSTRUCTION. An instruction asked, to the effect that, if the fatal wound was given in an affray which was but the culmination of a continued fight, then defendant could not be found guilty of any offense higher than manslaughter, and not of that offense, if he was defending himself, was properly refused, since he may have been the aggressor all through the fight. (Compare *State v. Morphy*, 83 Iowa, 276). *Id.*
53. ——— : SELF-DEFENSE AFTER FIRST BEING AGGRESSOR : BURDEN OF PROOF : INSTRUCTION. An instruction which says, in effect, that if defendant, in the first instance, sought a disturbance or fight with the deceased, but afterwards sought to avoid the difficulty, the burden of proving that he inflicted the wound in self-defense is upon defendant, *held* erroneous. (See opinion for cases followed and distinguished). *Id.*

54. ———: **MUTUAL COMBAT: SELF-DEFENSE AFTER WITHDRAWING: INSTRUCTION.** The court instructed that, "in case of mutual combat, where both parties are in the wrong, both or either are responsible for the results of their acts, and one cannot claim anything on the ground of self-defense from the assaults of the other, if within the nature of the combat, until he has first withdrawn from the combat, and retreated as far as he can with safety, and clearly evinces to his adversary his intention to do so." *Held* too strict as to the party withdrawing—it being sufficient if his adversary has reasonable grounds for believing that he has withdrawn, even though the fact is not clearly evinced. *Id.*
55. ———: **INDICTMENT: COUNTS NOT IN ALTERNATIVE.** An indictment for murder charged in one count that the offense was committed with a knife, and in another that it was committed with a certain sharp instrument to the grand jury unknown. *Held* that, although the counts were not in the alternative, the indictment evidently charged but one offense, and was therefore not bad on that account. (Compare *State v. Watrous*, 13 Iowa, 494). *Id.*
56. ———: **EVIDENCE: COMPETENT, THOUGH WEAK.** Upon a trial for murder, it was shown that a bottle usually used to contain a certain kind of bitters was found in a buggy, not far from where the body of the deceased was found, and that, when last seen alive, he was riding in the buggy. *Held* that it was competent to prove by a witness that he had, on the evening before, sold defendant a similar bottle containing bitters, as tending to connect defendant with the crime. *State v. Rainsbarger*, 196.
57. ———: ———: **MOTIVE.** Evidence which tends to show the relations between the defendant and the deceased, and a motive for the homicide with which defendant is charged, is admissible against him; and such was the evidence objected to in this case. (See opinion). *Id.*
58. ———: ———: **WEAPON IN DEFENDANT'S POSSESSION.** Evidence that defendant had, before the homicide, a pair of "knuckles" was admissible against him, where the wounds upon the decedent were such that they might have been made by such weapons. *Id.*
59. ———: ———: **IDENTIFICATION OF BUGGY BY ITS "RATTLE."** Where, in a case of homicide, the identification of a certain buggy as being that of the deceased was material, *held* that the testimony of a wagon-maker, to the effect that he knew defendant's buggy, and that he knew the one in question to be his by the peculiar rattle of its wheels, was competent. *Id.*
60. ———: **EXPERT TESTIMONY: WHAT IS NOT.** In a case of homicide, the defendant, after stating hypothetically the character of the wounds, asked a witness, who was a physician, how the wounds were probably produced. *Held* that the question was properly excluded, because it called for an opinion on matters not peculiarly within the knowledge of the medical profession. *Id.*
61. ———: **EVIDENCE TO SUPPORT VERDICT OF GUILTY.** The deceased was last seen alive riding in a buggy. He was found dead under such circumstances as to suggest that he came to his death through an accident connected with the management of the horse and buggy; and this was the theory of defendant. But the theory of the state was that defendant killed him, and then disposed the surroundings in such a way as to indicate death by accident. The jury found defendant guilty; and, as there was no such lack of evidence to support the verdict as to lead to the conclusion that it was the result of passion and prejudice, *held* that it could not be reversed on appeal. *Id.*

62. ———: **INSANITY AS DEFENSE: BURDEN OF PROOF.** The court instructed the jury as follows: "When the state shows, beyond reasonable doubt, in the first instance, that the defendant is guilty, then defendant comes to his plea of insanity; and when he comes to rely on such plea, then, under the law, he is required, in order to excuse his act on account of the alleged insanity, to show by a preponderance of the evidence,—that is, by the greater weight of credible evidence in the case,—that he was insane." *Held* correct, and that the court was not required to give another instruction to the effect that, if insanity was made probable by the evidence, defendant should be acquitted. (Compare *State v. Jones*, 64 Iowa, 356). *State v. Trout*, 545.
63. ———: **IMPRISONMENT FOR LIFE: FORM OF VERDICT.** Where the court instructed the jury that, if they found defendant guilty of murder in the first degree, they should determine whether he should be punished by death, or by imprisonment for life at hard labor in the state penitentiary, and they found him guilty, and that he "should be punished by imprisonment in the penitentiary for life," *held* that the omission of the words "at hard labor" did not render the verdict fatally defective, but that defendant was properly sentenced to imprisonment for life at hard labor. *Id.*
64. **COSTS ON APPEAL: LIABILITY OF COUNTY.** See Costs, 2.
65. **AS TO OFFENSES RELATING TO INTOXICATING LIQUORS,** see that title.
66. **APPEARANCE BOND: DISCHARGE OF SURETIES BY LACHES.** See Sureties, 1, 2.

DAMAGES.

1. **MEASURE OF: INJURY TO MARE IN BREEDING.** In an action for an injury to a mare in breeding her, caused by the alleged negligence of defendants, and resulting in her death, the measure of plaintiff's damages was her value at the time of the injury (*Gardner v. Burlington, C. R. & N. Ry. Co.*, 68 Iowa, 592); and it was error to admit evidence of resulting injury to her sucking colt, no such claim having been pleaded. *Gamble v. Mullin*, 99.
2. ———: **DEFICIENCY OF LAND SOLD.** Where defendant sold land to plaintiff for thirty dollars per acre, or a gross sum of twenty-five hundred and twenty dollars, falsely representing that the tract contained eighty-four acres, but it in fact contained only seventy-five and seventy-nine one-hundredths acres, and plaintiff brought suit for damages, alleging the above facts, *held* that the measure of his damages was the difference between the value of the tract as it was represented to be, and its value as it really was; and that the value as represented was fixed by the law at twenty-five hundred and twenty dollars, because the parties had agreed upon that sum. Also that instructions to that effect were appropriate to the issues. *Howes v. Artell*, 400.
3. **EXEMPLARY.** See Assault and Battery, 2; Railroads, 27.
4. **FOR RIGHT OF WAY.** See Railroads, 6-9, 10.
5. **FOR OBSTRUCTING WATER.** See Railroads, 18.

See NUISANCE, 8; RAILROADS, 25, 38, 40; VENDOR AND VENDEE, 5.

DECREE.

See JUDGMENT.

DEDICATION.

See HIGHWAY, 2-4.

DEED.

EXECUTION : EVIDENCE. A warranty deed made by a woman and her husband cannot be invalidated as against the grantee, much less against a *bona-fide* subsequent purchaser, upon the testimony of the woman that she was not aware that she had signed a warranty deed, but thought that she had signed a power of attorney to sell other land, and that at the time she supposed that she had lost through tax sales the land described in the deed, and the testimony of the husband that they did not execute the deed, but a power of attorney ;—the woman making no claim that any fraud was practised upon her, nor that she did not know the contents of the paper, and the husband stating that he did not read the instrument at all, but understood that it was a power of attorney. *Buck v. Holt*, 294.

DEFAULT.

See JUDGMENT, 6-11.

DELIVERY.

See CONTRACTS, 4 ; SALES, 1.

DEPOSITIONS.

1. **MOTION TO SUPPRESS : EVIDENCE.** A motion to suppress a deposition was based upon an affidavit of defendant's counsel, showing that a notice of taking the deposition, served on defendant, did not state the place of the residence of the officer to whom the commission was issued. *Held* that this, without more, was insufficient. *Rayburn v. Central Iowa Ry. Co.*, 637.
2. **OBJECTING TO INCOMPETENT EVIDENCE : TIME.** Where a witness in a deposition gave incompetent testimony, because relating to transactions with one deceased, but the adverse party did not know of the decease until the examination in chief had closed, and he then made the objection, and afterwards, six months before the trial, he moved the court to strike out the objectionable testimony, *held* that the objection was made in time. *Leathers v. Ross*, 630.

DESCRIPTION.

See CHATTEL MORTGAGE, 4, 7, 8 ; MECHANIC'S LIENS, 2.

DISCOVERY OF PROPERTY.

See EXECUTION, 1, 2.

DITCHES.

See HIGHWAY, 5, 6.

DIVORCE.

1. **DECREE IN NEBRASKA WITHOUT JURISDICTION : COLLATERAL ATTACK IN IOWA.** In an application by plaintiff for the admeasurement of his dower in his deceased wife's land, it was alleged in answer that his wife had been divorced from him by a decree rendered in Nebraska. *Held* that it was competent for him to assail the decree by showing that it was rendered without jurisdiction, and that a demurrer to a reply setting up facts showing such want of jurisdiction was properly overruled. (See authorities cited in opinion). *Neff v. Beauchamp*, 92.

2. **TEMPORARY ALIMONY : REVIEW ON APPEAL.** An order allowing temporary alimony to a wife in an action for divorce is reviewable on appeal to this court, under Code, section 3164. *Blair v. Blair*, 811.
3. ——— : ——— : **EVIDENCE WANTING.** In the absence of all of the evidence on which temporary alimony was granted in the court below, this court cannot say that the allowance was excessive. *Id.*
4. **ATTORNEY'S FEES : ALLOWANCE ON APPEAL.** The decision appealed from in this case provided that the matter of allowing an attorney's fee should be continued to next term, and appellant made no complaint of such provision, but appellee now seeks in this court to have a fee allowed for the services of her attorney on the appeal. There being no proper evidence before this court on which to make such allowance, it is refused, without prejudice to a recovery upon a sufficient showing at the proper time. *Id.*
5. **SUBSEQUENT ACTION FOR SUPPORT OF CHILD : WHAT MUST BE SHOWN.** Where a decree of divorce has been granted, and the custody of a child awarded to plaintiff, and a judgment of a certain sum as alimony has been rendered in her favor, this is conclusive on the parties so long as the circumstances remain the same; and a subsequent supplemental proceeding, or independent action, seeking to recover an additional sum for the support of the child, cannot be maintained without alleging such change in the circumstances of the parties as would make an additional order expedient. (See Code, sec. 2229). *Reid v. Reid*, 681.
6. **HUSBAND'S LIABILITY FOR WIFE'S ATTORNEY FEES.** See Husband and Wife, 1, 2.

DOMESTIC RELATIONS.

COMPENSATION TO MEMBERS OF FAMILY FOR SERVICES. Three brothers were living together in the same house, and engaged in cultivating their farms as partners. Their mother and another brother lived with them as members of the same family, the former doing the household work, and the latter working at farm labor, and both had their living in the family at the expense of the three brothers, who were partners. But, in actions against the estate of one of the deceased partners for compensation, they clearly established the fact that their services were worth much more than their living, and were rendered with the expectation on their part, and on the part of the partners, that a fair compensation would be made therefor, though no agreement was ever had as to the amount of such compensation. *Held* that, in order to a recovery, it was not necessary to show an express contract to pay for the services. (*Scully v. Scully's Ex'r*, 28 Iowa, 549, distinguished; and see *Cowan v. Musgrove*, 78 Iowa, 384). *Maggarell v. Maggarell*, 378.

See BASTARDY, 1; CRIMINAL LAW, 7, 8; HUSBAND AND WIFE.

EMBEZZLEMENT.

See CRIMINAL LAW, 36-38.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT, 1, 2; RAILROADS, 33-40.

EQUITY.

1. **JURISDICTION : PARTNERSHIPS.** Partnerships, and the question of their existence, are matters of which chancery has jurisdiction (*Aultman v. Fuller*, 53 Iowa, 60; *Richardson v. Grinnell*, 63 Iowa, 44); and where such an issue is raised, it is not improper to transfer the cause to the chancery docket for determination. *McReynolds v. McReynolds*, 89.

2. **UNDUE INFLUENCE : RESCISSION.** See Conveyance, 1.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 8 ; FRAUD, 1 ; MISTAKE, 2 ; REAL ESTATE, 1.

ESTATES OF DECEDENTS.

See WILLS.

ESTOPPEL.

IN PAIS : WHAT NECESSARY TO CONSTITUTE. Where a creditor, whose debt arose under a contract with an agent, represented to the principal that the debt had been paid by the agent, but the principal had already settled with the agent with the understanding that the debt had not been paid, and that the principal would have it to pay, and afterwards paid the agent the amount thus agreed to be due him upon the settlement, *held* that the creditor was not estopped from looking to the principal for the amount of the debt, since the principal did not rely upon the representations made by the creditor, and would not sustain any injury by the creditor's being permitted to deny the truth of the representations. *Guest v. Burlington Opera-House Co.*, 457.

See FORMER ADJUDICATION ; INSURANCE, 8.

EVIDENCE.

1. **RECALLING WITNESS : DISCRETION OF COURT.** In the absence of a showing that the trial court abused its discretion, this court will not interfere with its refusal to allow defendant to recall a witness for cross-examination on the ground that counsel was not informed, at the examination in chief, of the further fact he wished to elicit. *Fowler v. Town of Strawberry Hill*, 644.
2. **ORDER OF INTRODUCTION : DISCRETION.** The order in which evidence shall be introduced is a matter largely within the discretion of the trial court, and an irregularity in that respect will very seldom afford grounds for disturbing a judgment. *Wells v. Kavanagh*, 872.
3. **CONTRACT BETWEEN DEFENDANT AND STRANGER.** Where the action was for labor done and materials furnished to a subcontractor, and was brought on a contract and bond wherein the principal and sureties bound themselves to pay all just claims against the principal or his subcontractors for labor and materials furnished upon the work, *held* that a subsequent contract made between the principal and the subcontractor, whereby the latter undertook to perform all the labor and furnish all the materials, was properly excluded when offered in evidence by the defendants. *Id.*
4. **CONTRACT : PAROL TO ADD WARRANTY TO WRITING.** Where a written contract is full and complete, it is incompetent, in the absence of fraud, mistake, or the like, to vary it by evidence of a parol warranty not expressed in its terms. (See *Mast v. Pearce*, 58 Iowa, 579). And it cannot be shown that it was part of the agreement that the whole of the contract was not to be reduced to writing. *Warbasse v. Card*, 306.
5. **WRITTEN CONTRACT : COLLATERAL ORAL AGREEMENTS.** Collateral oral agreements, while they are inadmissible to vary a written contract, may be proved for the purpose of showing that the contract never had a legal existence. (Compare *Bowman v. Torr*, 3 Iowa, 578). *Brewster v. Reel*, 506.

6. **SETTLEMENT : CONTRADICTION OF RECEIPTS BY PAROL.** Since receipts showing a settlement are but *prima-facie* evidence of that fact ; and may be contradicted by parol, *held* that where there was such a contradiction, and a finding by the jury that there was no settlement, this court could not interfere with such finding as being unwarranted. *Thompson v. Maxwell*, 415.
7. **PRACTICE : ORAL AGREEMENT OF ATTORNEYS.** Under section 213 of the Code, an agreement between the attorneys in a case affecting the rights of clients cannot be established by oral evidence, except the admission of the attorney whose client is to be charged by the agreement. *State v. Stewart*, 386.
8. **OBJECTIONS TO—NOT TO WITNESSES.** The objection of “incompetent, irrelevant and immaterial,” to offered testimony, without more, goes to the testimony alone, and not to the competency of the witnesses. (Compare *White v. Smith*, 54 Iowa, 233). *Ball v. Keokuk & N. W. Ry Co.*, 132.
9. **GENERAL OBJECTION TO INTERROGATORY AND ANSWER : EFFECT.** When a whole interrogatory and its answer are objected to as incompetent and irrelevant, the objection is properly overruled if any portion of the interrogatory and answer is competent and relevant. *Bothwell v. Farwell*, 324.
10. **CROSS-EXAMINATION : WHAT PROPER.** Where an answer sought to be elicited by a question on cross-examination tends in some degree to contradict the testimony in chief of the witness, it is competent and relevant. *Id.*
11. **CIRCUMSTANTIAL : WHAT NECESSARY.** A theory cannot be said to be established by circumstantial evidence, even in a civil case, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory. (See opinion for illustration). *Asbach v. Chicago, B. & Q. Ry Co.*, 248.
12. **TRANSACTIONS BETWEEN PERSONS DECEASED.** In an action to recover land which plaintiffs' father traded to defendants' brother for other lands, where the father and brother and an intermediate owner were all dead, *held* that one of the defendants was incompetent to testify to the personal transactions between the persons deceased. (Code, sec. 3639). *Leathers v. Ross*, 630.
13. **TRANSACTIONS WITH ONE DECEASED.** In an action by one of several heirs to partition land, a part of which had long been occupied by another of the heirs, *held* that the oral testimony of the occupying heir and his wife, as to an agreement of the ancestor to give the occupied land to him, was incompetent, under section 3639 of the Code. *Wertz v. Merritt*, 683.
14. **COMPETENT THOUGH WEAK.** Where the only witnesses as to the issue of payment were plaintiff and defendant, and one affirmed and the other denied, *held* that corroborative evidence, however weak, was competent and relevant. (See opinion for illustration). *Koltze v. Messenbrink*, 242.
15. **VALUE OF NURSERY STOCK : PRICE AT WHICH CONTRACTED.** Where the question was as to the value of a lot of fruit trees at the place of their destination on a railroad, *held* that evidence of the price at which the owner had contracted to sell them there was admissible, as affording some evidence of their value there. *Clements v. Burlington, C. R. & N. Ry. Co.*, 442.

16. **VALUE OF LAND AS BEARING ON CONTRACT PRICE.** Where the issue was as to the price orally agreed to be paid for land, *held* that evidence of the value of the land was relevant. (See *Johnson v. Harder*, 45 Iowa, 667). *Paddleford v. Cook*, 433.
17. **EXCLUSION OF : INTENT NOT SHOWN.** This court cannot say that it was error to exclude answers to certain questions, when it was not shown, and does not appear, what evidence was intended to be elicited. *Id.*
18. **ERROR WITHOUT PREJUDICE.** It is not prejudicial error to exclude evidence which is afterwards admitted. *Harl v. Pottawattamie County Mut. Fire Ins. Co.*, 39.
19. **HARMLESS ERROR.** Error in admitting evidence is no ground for reversal where it appears that it wrought no prejudice to appellant. *Dickens v. City of Des Moines*, 216.
20. **—— : POINT ALREADY ESTABLISHED.** Where the interest of a witness in the result of a suit has been fully shown, it is not reversible error to exclude further testimony on that point. *Shannon v. Tama City*, 22.
21. **ADMISSION OF : ERROR WITHOUT PREJUDICE.** The erroneous admission of evidence whose only tendency is to establish a fact otherwise fully established, is without prejudice, and no ground for reversal. *Winter v. Cent. Iowa Ry. Co.*, 448.
22. **UNAUTHENTICATED LETTER : ERROR WITHOUT PREJUDICE.** There is no prejudice, and therefore no reversible error, in admitting in evidence a letter not fully authenticated, when its only effect is to establish a fact already established by testimony not objected to. *Brown v. State Ins. Co.*, 428.
23. **ERROR IN ADMITTING : CURED BY INSTRUCTION.** Error in the admission of evidence is cured by an instruction which in effect withdraws the objectionable evidence from the consideration of the jury. *Sullens v. Chicago, R. I. & P. Ry. Co.*, 659 ; *State v. Schaffer*, 704.
24. **WITNESSES : IMPEACHMENT : CORROBORATION.** A witness may be impeached by showing that he made statements out of court contradictory to his evidence as a witness ; but evidence that he made statements out of court in harmony with his evidence is not admissible in rebuttal, for the purpose of corroboration. *State v. Porter*, 623.
25. **WITNESS : EXAMINATION : CONVICTION FOR CRIME.** A witness may be asked whether he has ever been convicted of a felony (Code, sec. 3648), but not whether he has ever been convicted of a crime, since crimes are not all felonies. *Hanners v. McClelland*, 818.
26. **CROSS-EXAMINATION : CHARGE OF FRAUD : DISCRETION OF COURT.** In an action on a promissory note which defendant alleged to have been forged, plaintiff testified that he saw defendant sign the note, and on cross-examination he was asked as to circumstances connected with the making of the note ; none of the questions referring directly to any fact testified to on the examination in chief. *Held* that, while the questions might well have been allowed under the rule which grants considerable latitude when an issue of bad faith on the part of the witness is raised, yet it was a matter largely within the discretion of the court, and that this court could not well interfere, in view of the fact that not all of the collateral evidence is presented in the abstract. *Riordan v. Guggerty*, 688.
27. **OBJECTIONS TO EVIDENCE ELICITED BY SELF.** A party cannot be heard to object to testimony which he causes to be given by the cross examination of his adversary's witnesses. *Id.*

28. **SIGNATURES : COMPARISONS BY EXPERTS.** No valid objection can be made to the testimony of experts as to the characteristics of different signatures, where it is confined to the signature in controversy and to others admitted to be genuine. (See Code, sec. 8655). *Id.*
29. **NOT RELEVANT TO ISSUE.** Upon a claim for a failure to pay over rents actually collected, evidence as to the rental value of the buildings is irrelevant. *Id.*
30. **CROSS-EXAMINATION : RELEVANCY AND WEIGHT.** A written statement of account made by plaintiff to defendant relevant to the matter in controversy between them, which was called out in the cross-examination of defendant, and with regard to which he made admissions inconsistent with his examination in chief, was properly admitted as a part of the cross-examination, though not of much weight. *Id.*
31. **ACTION ON ACCOUNT : METHODS OF DEALING.** On the issue raised by a counter-claim for rents collected, plaintiff was properly permitted to detail his method of dealing with defendant during the time in question, including the manner of keeping books and making statements and settlements. *Id.*
32. **REFRESHING MEMORY : USE OF STUB-BOOK.** A witness may use a stub-book of checks to refresh his memory as to payments made by him. (Compare *State v. Miller*, 53 Iowa, 154, and *Hull v. Alexander*, 26 Iowa, 569). *Id.*
33. **COPY OF TELEGRAM : FOUNDATION.** Where the uncontradicted evidence showed that it was the custom to destroy the originals of telegrams after six months, and that the original of the one in question could not be found, this was a sufficient foundation for the introduction of a copy, without proving the rule of the company for destroying the originals. *Id.*
34. **JUDICIAL NOTICE.** See Assignment for Benefit of Creditors, 3.
35. **TO DEFEAT FRAUDULENT CONVEYANCE.** See Chattel Mortgage, 1.
36. **PAROL TO AID DEFECTIVE DESCRIPTION.** See Chattel Mortgage, 8.
37. **FOR EVIDENCE IN CRIMINAL CASES,** see Criminal Law, *passim*.
38. **TO SET ASIDE CONVEYANCE.** See Deed.
39. **PAROL AS TO TITLE OF LAND.** See Highway, 3.
40. **OF TITLE BY PRESCRIPTION.** See Highway, 2-4.
41. **TO SUPPORT VERDICT OR FINDING OF FACT.** See Practice in Supreme Court, 23-28.
42. **OF MENTAL CAPACITY.** See Wills—3, 7, 14-17.
43. **FOR EVIDENCE ON PARTICULAR SUBJECTS,** see appropriate titles.

See DEPOSITIONS ; ESTOPPEL.

EXCEPTIONS.

To TAXATION OF COSTS. See Costs, 4.

See PRACTICE AND PROCEDURE, 6, 7, 10, 12, 13, 15 ; PRACTICE IN SUPREME COURT, 37-39 ; BILL OF EXCEPTIONS.

EXECUTION.

1. **AUXILIARY PROCEEDINGS : NOTICE TO DEFENDANT.** When the defendant is present in court at all stages of a proceeding auxiliary to execution for the purpose of discovering property, an order made will be binding on him without its being reduced to writing and signed by the judge and personally served. *McDonnell v. Henderson*, 619.
2. ——— : **EXAMINATION OF DEFENDANT : AFFIDAVIT AS BASIS OF.** Where a defendant is examined for the discovery of property in a proceeding auxiliary to execution, and a second examination is had which is but a continuation of the first, a new affidavit is not required by section 3186 of the Code. *Id.*

LEVY : NOTICE OF PRIOR EQUITY. See Sales, 1.

See JUDICIAL SALE.

EXECUTOR.

See WILLS, 10.

EXPERT TESTIMONY.

See CRIMINAL LAW, 60 ; EVIDENCE, 28 ; WILLS, 5, 7, 16.

FALSE REPRESENTATIONS.

See DAMAGES, 2 ; INSURANCE, 15 ; SALES, 4 ; VENDOR AND VENDEE, 3-5.

FENCES.

See RAILROADS, 41-44.

FORGERY.

See CRIMINAL LAW, 39 40.

FORMER ADJUDICATION.

1. **AS TO WHETHER DEEDS WERE MORTGAGES : FACTS CONSTITUTING.** In 1867, S. was indebted to C., and conveyed to him, by deeds which were absolute on their face, certain lands. A few days afterwards H. recovered judgment against S., and had execution thereunder levied on the land as the property of S. Thereupon C., in an action in which S. was a defendant, enjoined the sale of the land, and H. in his answer set up, among other things, that the conveyances were given only to secure debts, and were mortgages in equity. On this issue the court in that action found for C. against all the defendants, including S. In 1884, S. sought to establish, in this action, that the deeds were mere mortgages, and asked for an accounting. *Held* that the adjudication against him, above referred to, was conclusive as to that point, in the absence of any clear and satisfactory showing that it was obtained by fraud. *Corliss v. Conable*, 58.
2. **SUFFICIENCY OF ORIGINAL NOTICE.** In such case, the notice addressed to S., in the suit brought by C., stated that the petition demanded an injunction restraining the sheriff from selling the land, and a decree "that the property of C. be not liable for the debts of S." *Held* a sufficient statement to notify S. of the nature of the action, and to bind him by the adjudication that the land belonged absolutely to C. *Id.*
3. **ISSUE WITHDRAWN.** An issue raised by answer, but withdrawn by the defendant before trial, cannot be said to be adjudicated in the determination of the cause. *Finnegan v. Campbell*, 158.

4. **HOW FAR BINDING : PRIVIES.** In an action by plaintiff against T., to set aside tax deeds and quiet his title, he alleged ownership in himself, and that allegation was denied in the answer. Judgment was rendered according to the prayer of the petition, but plaintiff was required by the judgment to pay to T. the amount of the taxes which he had paid on the land, and plaintiff paid the same. Before the judgment was rendered, T. became possessed of the same claim of title which defendant in this case asserts against plaintiff, and he afterwards conveyed the land by warranty deed to defendant herein. *Held* that, by the judgment against T., not only he, but defendant herein as his privy, was estopped from either asserting title in himself, or denying plaintiff's ownership of the property; the rule being that a judgment operates as an estoppel upon parties and privies, not only as to all matters in issue, but as to all controverted points upon which the verdict or finding was rendered, and as to all defenses which might have been pleaded. (See cases cited in the opinion). *Reed v. Douglass*, 244.
5. **RECOVERY OF TAXES PAID BY MISTAKE.** (*Goodnow v. Litchfield*, 59 Iowa, 226, *followed*; *Goodnow v. Stryker*, 61 Iowa, 261, *distinguished*). *Goodnow v. Burrows*, 251, 256.
6. **BY JUDGMENT IN FEDERAL COURTS : JURISDICTION UPON REMOVAL OF CAUSE : ONLY PART OF DEFENDANTS NON-RESIDENTS.** Plaintiff's assignor, a corporation resident of Iowa, brought an action in an Iowa court against another corporation resident of Iowa, and several non-residents, including the defendant herein. Several of the non-resident defendants, not including the defendant herein, procured a removal of the cause to the circuit court of the United States. After such removal, the defendant herein, with the consent of the plaintiff in that case, and upon a finding of the federal circuit court that he, by reason of his non-residence in Iowa, was entitled to a removal of the cause, was allowed to appear and answer in that court, and, upon a trial of the issues joined, the very issue involved in this case was adjudicated against plaintiff's assignor; and, upon appeal to the supreme court of the United States, the judgment was affirmed. The resident defendant in that case did not petition for a removal of the cause. Plaintiff herein now insists that that judgment is not binding upon him, on the ground that the federal court had no jurisdiction, because the plaintiff and principal defendant in that case were both residents of Iowa, and, therefore, the right of removal did not exist. But *held*—
 - (1) That the right of removal did exist as to the non-resident defendants, if the cause between plaintiff and them was such that it could be determined without the presence of the resident defendant; and
 - (2) That, whether the cause was such or not, the statute governing the right of removal is a federal statute, and its construction by the federal courts is binding upon the state courts; and, since the federal court expressly found that the cause was rightly removed as to the defendant herein, and the plaintiff in that case consented in that court to a trial and determination of the cause as between it and the defendant herein, as assignee, the plaintiff herein, is bound by the judgment in that case.
 - (3) That it is immaterial, so far as the question of former adjudication is concerned, whether the decision of the federal court as to the removability of the case was right or wrong; and if the resident defendant followed the case to the federal court, and, by consent of the plaintiff, had its rights adjudicated there, with or without jurisdiction, that, also, is immaterial to the point herein decided. *Id.*

7. **FACTS CONSTITUTING.** Where a married woman brought an action against a trustee to set aside a trust deed, but the court decreed that the deed should stand, and that the trustee should pay her a certain sum in satisfaction of the claim of herself and husband in the land, *held* that the husband was thereby estopped from bringing a subsequent action against the trustee to set aside the deed. *Determann v. Luehrsmann*, 275.
8. **PARTIES ONLY BOUND : INSTANCE : VENDOR AND VENDEE.** Defendant sold land to plaintiff on which there was an unsatisfied mortgage of record, but defendant represented that the mortgage was a forgery, and no lien on the land. Afterwards, in an action to which plaintiff was a party, the mortgage was foreclosed, and plaintiff brought this action for damages on account of the alleged misrepresentation. Defendant, in answer, averred that the mortgage was a forgery, and that if plaintiff had made diligent defense it would have been so adjudged. *Held* that, as defendant was not a party to the foreclosure suit, the judgment in that case did not preclude him from setting up the fraudulent character of the mortgage. *Everling v. Holcomb*, 722.

See WILLS, 11.

FRAUD.

1. **RESCISSION OF CONVEYANCE PROCURED BY.** Defendant, by fraudulent representations as to the value of certain Texas land-scrip certificates, induced plaintiff to convey to him certain real estate and personal property in exchange for four of said certificates. The certificates were practically worthless, and plaintiff was substantially so informed through a letter received by him from the commissioner of the Texas land-office before the trade was consummated; but defendant produced such other evidence of the value of the certificates that plaintiff, not unreasonably, believed his statements rather than those of the land commissioner. *Held* that the conveyance was properly set aside in equity, and a judgment entered in plaintiff's favor for the damages sustained by him on account of the fraud. *Cowles v. Barber*, 71.
2. **PROOF OF.** See Instructions, 5.

See DAMAGES, 2; INSURANCE, 15; SALES, 4; VENDOR AND VENDEE, 5.

FRAUDULENT CONVEYANCE.

1. **SUBJECTION OF PROPERTY TO GRANTOR'S DEBT : RIGHT OF GRANTEE TO REDEEM FROM SALE : TIME.** While the statutory right to redeem from an execution sale can be exercised only within the period and in the manner prescribed by the statute, the right of the grantee in a fraudulent conveyance to discharge a judgment against his grantor, which has been adjudged a lien upon the property, is an equitable one, and quite different. And where a husband conveyed a farm to his wife in fraud of creditors, and afterwards a judgment was recovered against him, and in an action against her it was decreed to be a lien on the farm, and before the sale she appealed from the judgment, but the appeal was not decided until more than a year after the sale, *held* that the sheriff was properly enjoined from executing a deed under the sale at the end of the year, and that upon the judgment creating the lien on the property being affirmed, and the payment by her, soon thereafter, to the clerk of the court in which the judgment was rendered, of the amount of the lien, though this was more than a year from the date of the sale, the property was discharged of the lien, and the injunction against the sheriff was properly made perpetual. *Teabout v. Jaffray*, 28.

2. **OF STOCK OF GOODS : EVIDENCE.** The evidence in this case considered (see opinion) and *held* to be sufficient to prove that the conveyance of the stock of goods in question was made and accepted for the purpose of defrauding creditors. *Richardson v. Woodring*, 149.
3. **TO WIFE TO DEFEAT HUSBAND'S CREDITORS.** Where a wife delivers money to her husband to be invested and proceeds accounted for, but no special accounting is ever had, but the obligation is never released, she may take a conveyance of property belonging to her husband in order to protect her interests, even though the husband has other creditors who may suffer thereby. *Sims v. Moore*, 497.
4. **FACTS CONSTITUTING.** Plaintiff loaned to one of the defendants, who was his son-in-law, large sums of money, supposing him to have considerable wealth, but when he came to demand payment, he found that he was insolvent, and that he had conveyed his land to his wife. The evidence shows that this conveyance was made, as between the parties thereto, for the purpose of defrauding the plaintiff. *Held* that it should be set aside, even though plaintiff, before he knew of the insolvency, and when he supposed the husband to have ample means, requested such conveyance to be made for the purpose of securing the property to his daughter. *Taylor v. Branscombe*, 584.
5. **PARENT TO CHILDREN.** A parent, who was a judgment debtor, bargained for, and with money in her possession paid for, certain land, which she directed to be deeded to her children. *Held* that this alone, with no evidence as to the ownership of the money paid for the land, was not sufficient to overcome the presumption in favor of the legal title in the children, nor to justify a judgment subjecting the property to the payment of the judgment. *Stoddard v. Rowe*, 670.
6. **EVIDENCE BY GRANTOR TO DEFEAT.** See Chattel Mortgage, 1.
See PARTIES TO ACTIONS, 1.

FRAUDULENTLY OBTAINING SIGNATURE.

See CRIMINAL LAW, 41-45.

GAMBLING.

See CONTRACT, 3.

GARNISHMENT.

AGREEMENT TO PAY DEFENDANT'S DEBT : STATUTE OF FRAUDS : RIGHTS OF GARNISHEE. S. sold cattle to I., and as a part of the purchase price I. orally agreed to pay a debt of five hundred dollars owing by S. to another. *Held* that such agreement was not within the statute of frauds, and that I., when garnished as a debtor to S. for the price of the cattle, should have been permitted to retain out of the purchase price the five hundred dollars which he had so agreed to pay to another, as he was legally holden to such other party therefor. *Clinton Nat. Bank v. Studemann*, 104.

See NEW TRIAL, 2.

GIFT.

OF LAND TO SON : EVIDENCE. A son occupied a portion of his father's land for twenty years prior to the father's death, and afterwards claimed that he owned the land under a verbal agreement (which he had performed on his part) that he was to occupy and cultivate the land during the father's life, giving him one-third of the crops, and afterwards to be the sole owner of the land. *Held* that the evidence (for which see opinion) did not support his claim. *Wertz v. Merritt*, 683.

GRAND JURY.

EVIDENCE BEFORE. See Criminal Law, 1, 2, 6, 10, 14.

GUARDIAN.

1. REPORT OF : CONCLUSIVENESS. The report of a guardian, when approved by the court, must be regarded as at least *prima facie* correct, casting on him who assails it the burden of proof to show error. (See *Latham v. Myers*, 57 Iowa, 519; *Brewer v. Stoddard*, 49 Iowa, 279). *Warfield v. Warfield*, 184.
2. REPORTS ASSAILED : ATTORNEY FEE FOR DEFENSE. An allowance made in this case to the guardian of an insane ward, for an attorney fee in defending her reports when assailed as being fraudulent and unjust, is approved. *Id.*

HANDWRITING.

EXPERT TESTIMONY. See Evidence, 28.

HIGHWAY.

1. OBSTRUCTION : PASSAGE ON ADJACENT LAND : ASSAULT : SELF-DEFENSE. When a highway is obstructed, the traveler has the right, in order to pass around the obstruction, to go upon adjacent land belonging to a private owner ; and when such owner, in order to prevent the exercise of such right, makes an assault upon the traveler, the latter may defend himself from such assault, and may plead the facts in an action against him by the owner for assault and battery made in such self-defense. *Irwin v. Yeager*, 174.
2. BY DEDICATION OR PRESCRIPTION : EVIDENCE OF USE BY PUBLIC. Where the question was as to the existence of a public highway, which, if it was a legal highway at all, became such either by dedication or prescription, and there was evidence tending to show a dedication, *held* that evidence of use by the public was competent for the purpose of showing an acceptance of the dedication, though not competent, under section 2031 of the Code, to show title in the public by prescription. *State v. Birmingham*, 407.
3. PROSECUTION FOR OBSTRUCTING : PAROL TESTIMONY AS TO TITLE TO LAND. In a prosecution for obstructing an alleged highway, which defendants claimed was not a legal highway, *held* that it was error to permit the state, in its attempt to prove that the highway existed by dedication or prescription, to introduce parol testimony as to the title to the land over which it ran, no foundation having been laid for such secondary evidence. *Id.*
4. BY DEDICATION : EVIDENCE : LAPSE OF TIME. Lapse of time is not necessary to the establishment of a highway by dedication. All that is necessary is a dedication by the owner and an acceptance by the public, and the dedication may be by writing, by declaration, or by conduct. And if the owner of the land in question knows for a series of years that the public is using and treating the road as a highway, and expending funds in its improvement, and he acquiesces in what is thus being done, such facts may well be considered as evidence tending to prove actual dedication. (See cases cited in opinion). *Id.*

5. **DITCHES : CUTTING OFF ACCESS TO ADJOINING LAND : INJUNCTION.** Plaintiff sought to enjoin the construction of a ditch for surface water on the side of the highway next to his land, on the ground that the water would in time wash the ditch so deep as to cut off access to his land without the construction of bridges. But it appearing that a small outlay of money would be sufficient to prevent the washing, and that the expense of the necessary bridges would not be great, and that the future convenience of the public might require such expense to be incurred. *held* that an order absolutely enjoining the construction of the ditch was not warranted. *Wilson v. Duncan*, 491.
6. **LOCATION OF DITCH : PRESCRIPTIVE RIGHT OF ADJOINING OWNER.** The fact that a ditch for the accommodation of surface water, flowing in part from plaintiff's land, has been maintained for more than ten years on the side of the road farthest from his land, does not give him a prescriptive right to have it forever maintained there. *Id.*

HOMESTEAD.

1. **EXEMPTION : PRIOR JUDGMENT.** A homestead is not exempt from a judgment against the owner rendered before the acquisition of the homestead. *Peterson v. Little*, 223.
2. **IN LEASEHOLD INTEREST : TENANCY IN COMMON : JUDGMENT LIEN.** M. obtained a judgment against J. on the ninth day of June, 1886, on a debt which was contracted in the fall of 1885, and the question was whether it was a lien on the portion of real estate which was afterwards allotted to him upon a partition of the land of his father, who died May 24, 1886. J. had occupied the land in question as a tenant of his father for twenty years prior to the latter's death ; but, conceding that he had a homestead right in his leasehold estate (see *Pelan v. De Bevard*, 13 Iowa, 53), that right did not survive that estate, which, by the terms of the lease ended with the father's death ; or, if he be regarded thereafter as a tenant at will, his right could have been terminated on the first day of March following his father's death (Code, secs. 2014, 2015), so that he could not, after that date, base any claim of homestead upon any interest he had in the land prior to his father's death. Nor could he base a claim of homestead upon the ground that he was a tenant in common with his co-heirs (see *Thorn v. Thorn*, 14 Iowa, 53), because such tenancy, if conceded, could not have begun prior to his father's death ; but that was after the debt had been contracted on which the judgment was obtained. Accordingly *held* that the land was not exempt as a homestead. *Wertz v. Merritt*, 683.

HOMICIDE.

See CRIMINAL LAW, 49-63.

HOUSE OF ILL FAME.

See CRIMINAL LAW, 46-47.

HUSBAND AND WIFE.

1. **ACTION FOR DIVORCE : HUSBAND'S LIABILITY FOR WIFE'S ATTORNEY FEES.** It is the settled doctrine in this state that in actions for divorce the husband is liable to the wife's attorney for his reasonable fees earned in conducting the litigation in her behalf (*Porter v. Briggs*, 38 Iowa, 166 ; *Preston v. Johnson*, 65 Iowa, 285) ; and the rule applies not only to the wife's chief counsel, but also to assistant counsel properly employed by him under her directions. *Clyde v. Peavy*, 47.

2. ——— : INTERLOCUTORY ALLOWANCES FOR WIFE'S ATTORNEY FEES : HUSBAND'S FURTHER LIABILITY. Orders made pending an action for divorce, making allowances to the wife for attorney fees, are not final adjudications of the amount to which her attorneys are entitled for their services, and the fact that the husband has paid all such allowances is not a good defense to an action by one of her attorneys against him for the reasonable value of services not covered by such allowances. *Id.*
3. PRIOR INSANITY OF HUSBAND : NOTICE TO WIFE : PRIOR APPOINTMENT OF GUARDIAN : COMPENSATION TO WIFE. Where a woman had been acquainted with and engaged to a man for some years, and had known of his doing business and managing large property interests, and supposed him to be of sound mind up to the time of their marriage, *held* that her knowledge that a nephew was opposing the marriage was no notice to her that he was insane; nor did the fact that the nephew had a few days before made application to the circuit court of the county for the appointment of a guardian for such person, and had himself been appointed temporary guardian, charge her with knowledge of his insanity, in the absence of actual knowledge of such facts; but that, the marriage being afterwards declared a nullity on account of his insanity, she was entitled to compensation, under section 2236 of the Code, as one who had entered into the contract in good faith, in ignorance of the insanity. *Barber v. Barber*, 301.
4. ——— : ——— : DISSOLUTION : COMPENSATION. Where a marriage was decreed to be a nullity on account of the insanity of the husband at the time of the contract, and it appeared that the wife was in good health when married, but that she had lost her health on account of the deprivations suffered by her while living with her husband, and it further appeared that he was worth about fifteen thousand dollars at the time the marriage was annulled by the decree, *held* that an allowance to her of thirty-five hundred dollars was fair compensation, under section 2236 of the Code. *Id.*
4. WIFE'S CRIMINAL LIABILITY FOR ACTS DONE IN HUSBAND'S PRESENCE. See Criminal Law, 7, 8.

See PERSONAL INJURIES, 1.

INDICTMENTS.

FOR INDICTMENTS FOR VARIOUS CRIMES, see Criminal Law, 2, 30, 31, 34, 37, 38, 39, 41, 46, 55; Intoxicating Liquors, 6, 7, 9, 32.

INFANTS.

See MINORS.

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1. VIOLATION : PUNISHMENT : COSTS. See Cities and Towns, 16.
2. ——— : COMMITMENT IN VACATION. See Constitutional Law, 1.
3. OF LIQUOR NUISANCES. See Intoxicating Liquors, *passim*.
4. OF RAILROAD CROSSING ANOTHER'S TRACK. See Railroads, 15.

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IN PARI DELICTO.

See CHATTEL MORTGAGE, 1.

INSANITY.

1. AS EXCUSE FOR CRIME. See Criminal Law, 62.
2. OF HUSBAND: DISSOLUTION OF MARRIAGE: COMPENSATION. See Husband and Wife, 3, 4.

See WILLS, 3-7, 15-17.

INSTRUCTIONS.

1. REFERRING TO PLEADINGS. Error in referring the jury to the pleadings in stating the issues is without prejudice, and no ground for reversal, where the jury is in other instructions fully and explicitly directed as to the facts necessary to be proved in order to a recovery. *Helt v. Smith*, 667.
2. READING PLEADINGS NOT INCORPORATED BY COPY: ERROR WITHOUT PREJUDICE. It is error to read to the jury the pleadings in the case, in charging the jury, when such pleadings are not copied into the instructions as a part thereof. (See Code, sec. 2788, and cases cited in opinion). But since the issues in this case were sufficiently stated in other paragraphs of the charge, *held* that the judgment should not be disturbed on account of the error. *Hall v. Carter*, 364.
3. READING INDICTMENT NOT COPIED IN CHARGE. In instructing the jury the court read the indictment as a part of the first paragraph of the charge. There was no statement of the issues in this paragraph, but a blank appeared therein after the following sentence: "The defendants are before you on the following indictment." After the blank appeared the following: "To which indictment the defendants have entered a plea of not guilty." *Held* error, as the instructions must be wholly in writing, signed by the judge. (See Code, sec. 4440; *State v. Brainard*, 25 Iowa, 578; *Hall v. Carter*, *ante*, p. 364). *State v. Birmingham*, 407.
4. ERROR CURED BY SPECIAL FINDING. An error in the charge of the court is no ground for reversal where, as in this case, it appears that it was without prejudice, in view of the facts specially found by the jury. *Hall v. Carter*, 364.
5. AS TO PROOF OF FRAUD. It is not necessary for the jury to find that all the circumstances surrounding a transaction combine to show fraud before fraud can be found. It is sufficient if they are reasonably satisfied from all the circumstances that fraud existed; and that was the purport of the instruction given in this case. *Id.*
6. PREMATURE READING IN PRESENCE OF JURY. The fact that the court, in response to the statements of counsel as to his views of the law, made just prior to the beginning of the argument to the jury, read to counsel, in the presence of the jury, one of the instructions of the charge, *held* to be no ground for reversal; there being nothing to show any abuse of the court's discretion as to such matters, nor any prejudice to the complaining party. *Id.*
7. INDICATING EFFECT OF TESTIMONY. It was error for the court in an instruction to speak of "circumstances introduced in evidence tending to connect the accused" with the offense charged in the indictment, since it was for the jury alone to determine the tendency of the evidence. *State v. Porter*, 623.
8. AS TO MATTERS NOT DISPUTED. It is not error to fail to instruct the jury as to a matter about which there is no dispute and as to which the jurors can have no doubt. *Ball v. Chicago, B. & Q. Ry. Co.*, 843.

9. **BASED ON FALSE ASSUMPTION.** An instruction based on an assumption which the evidence shows to be untrue should not be given. *Norris v. Kipp*, 444.
10. **BASED ON INCORRECT ASSUMPTION.** An instruction which incorrectly stated that all the evidence against defendant was circumstantial, and another instruction based on such incorrect statement, were properly refused. *State v. Cowan*, 53.
11. **NOT WARRANTED BY EVIDENCE.** An instruction based on assumed facts of which there is no evidence is erroneous. (See opinion for illustration). *Deeds v. Chicago, R. I. & P. Ry. Co.*, 154.
12. **NO EVIDENCE TO SUPPORT.** An instruction that defendant could be convicted if he aided or assisted in the commission of the murder charged was erroneous, where the evidence showed that, if he was guilty at all, he fired the fatal shot, and did not assist another. *State v. Porter*, 623.
13. **NO EVIDENCE TO WARRANT: ERROR WITHOUT PREJUDICE.** Submitting to the jury an issue on which there is no sufficient evidence is no ground for reversal on defendant's appeal, where the jury finds in his favor on that issue. *Miles v. Wikel*, 712.
14. **STATUTE OF LIMITATIONS: NO ISSUE.** In an action for money loaned, where it was clear that, if any loan was made, it was within five years of the beginning of the action, and there was no issue based on the statute of limitations, no instruction as to the limitation of actions of that kind would have been proper; and especially would it have been improper to instruct that plaintiff could recover only for a loan made "within the five years last past," since time in such cases is calculated from the beginning of the action. *Id.*
15. **NOT WARRANTED BY PLEADINGS OR PROOF.** It is error to give instructions based on facts not pleaded, and of which there is no evidence. (For illustrations and authorities cited, see opinion). *Fisk v. Chicago, M. & St. P. Ry Co.*, 424.
16. **JUDGED BY ISSUES PRESENTED IN CHARGE.** The correctness of an instruction must be determined by considering it in connection with the issues presented to the jury, and not with issues pleaded but not presented in the instructions. *Warbasse v. Card*, 303.
17. **WHOLE CHARGE CONSIDERED.** A defect in any part of the charge to the jury will not be ground for reversal when it is clear from the whole charge that the jury could not have been misled thereby. *Lindsay v. City of Des Moines*, 111.
18. **WHOLE CHARGE TO BE CONSIDERED.** An instruction which, by itself, might be partial and misleading is no ground for reversal when the whole charge is such as to present the case fully and fairly to the jury. *Shively v. Cedar Rapids, I. F. & N. W. Ry Co.*, 169.
19. **REFERRING TO ISSUES TAKEN FROM JURY.** Where some of the issues have been disposed of by the court in the course of the trial, all reference to them is properly omitted in the instructions to the jury. *Wells v. Kavanagh*, 872.
20. **ISSUES ELIMINATED FROM CASE.** Where an instruction asked is relevant to an issue made by the pleadings, but is not pertinent to the case as made by the evidence, and the question to which it relates has been eliminated from the case by the instructions given, such instruction should be refused. *Connors v. Burlington, C. R. & N. Ry. Co.*, 383.

21. **TAKING CASE FROM JURY : DUTY OF COURT.** It is error for the court to instruct the jury that if they find a certain state of facts the plaintiff cannot recover, when the uncontradicted evidence establishes that very state of facts. In such case it is the duty of the court to direct a verdict for defendant. *Id.*
22. **REPETITION NOT REQUIRED.** It is not error to refuse an instruction asked when the substance of it is given in the charge of the court. *Shannon v. Tama City*, 22; *State v. Rainsbarger*, 196; *Norris v. Kipp*, 444.
23. **ERROR CURED.** In an action upon a policy of fire insurance, the court erroneously instructed the jury, in stating the issues, that the defendant in its answer admitted that a part of the insured property was injured or destroyed by fire. *Held* that this error was without prejudice, because, in two other instructions, the jury were informed that, to authorize a verdict for the plaintiff, they must find from the evidence that the property, or a part of it, was injured or destroyed by fire. *Eiseman v. Hawkeye Ins. Co.*, 11.
24. **IN CRIMINAL CASES.** See Criminal Law, 7, 9, 11, 17, 18, 19, 25, 38, 52, 53, 54, 62.
25. **A JUSTICE OF THE PEACE CANNOT DIRECT A VERDICT.** See Justices and their Courts, 1.
26. **FOR INSTRUCTIONS ON PARTICULAR SUBJECTS,** see appropriate titles.
27. **DIRECTING VERDICT.** See Practice and Procedure, 11.

See NEGLIGENCE, 1-8.

INSURANCE.

(1) *Fire Insurance.*

1. **NOTICE OF LOSS AS REQUIRED BY THE POLICY.** In an action on a policy of fire insurance, an instruction to the effect that, to entitle plaintiff to recover, he must prove that he "gave defendant notice of the fire, and the loss thereunder, as required by the terms of the policy," *held* not to dispense with the necessity of *proof* of loss, since proof of loss must accompany such notice, under the terms of the policy. *Eiseman v. Hawkeye Ins. Co.*, 11.
2. **INSTRUCTIONS AS TO WAIVER NOT PLEADED.** If plaintiff, in an action upon a policy of fire insurance, relies upon a waiver by the company of conditions of the policy as an excuse for his failure to perform them, he must plead such waiver. (See cases cited in opinion). And so, where the company set up as a defense a breach by the insured of certain conditions of the policy, and plaintiff did not, either in his petition or by reply, raise the issue of waiver, it was error for the court to instruct the jury as though such issue were in the case. *Id.*
3. **MUTUAL COMPANY : CORPORATE CAPACITY : DEATH OF MEMBER : SUBSEQUENT LOSS : ASSESSMENT OF ADMINISTRATOR : ESTOPPEL.** Plaintiff's intestate was a member of the defendant company, and held its policy of insurance upon certain property. After his death, but within the term covered by the policy, the property was destroyed by fire. The company afterwards assessed the administrator on account of the policy, and received from him as such the amount of the assessment. *Held* that the company was estopped from claiming that the policy died with the decedent; and that it was immaterial whether the company was a corporation or a mere voluntary association. *Harl v. Pottawattamie County Mut. Fire Ins. Co.*, 89.

4. ———: ACTION ON POLICY NOT CONDITIONED UPON ASSESSMENT. Where neither the policy of a mutual fire insurance company, nor the articles and by-laws therein referred to, contained any limitation of liability to the amount realized from an assessment, *held* that an action for the full amount of the loss, not exceeding the insurance, could be maintained against the company before any assessment was made to meet the loss. (*Bailey v. Mut. Ben. Ass'n*, 71 Iowa, 689, *distinguished*). *Id.*
5. ———: ACTION ON POLICY: AMENDMENT: MANDAMUS TO COMPEL ASSESSMENT. In an action against a mutual insurance company, which had no funds to pay losses except as it obtained them by special assessments, it was proper to ask, as auxiliary to the main action, that a writ of *mandamus* issue to compel the levy of an assessment to pay the loss; and when such relief was asked in an amendment to the petition, it was error to strike it from the files on the ground that it was not a proper amendment, but the introduction of a new cause of action. *Id.*
6. CONSENT TO OTHER INSURANCE: FORM OF. The policy in question provided that it should be void if, without permission therefor in writing *thereon*, the assured should procure other insurance on the property. *Held* that additional insurance consented to by the company in writing did not avoid the policy, even though the consent was not written upon the policy. *Mattocks v. Des Moines Ins. Co.*, 233.
7. WAIVER OF MORTGAGE BY AGENT. The policy provided that it should be void if the property was mortgaged. But where notice of an existing mortgage was given to the agent who took the risk, and he gave the written consent of the company that the policy should continue in force notwithstanding the mortgage, *held* that the company was bound by the waiver. *Id.*
8. OWNERSHIP OF PROPERTY: DELIVERY OF DEED. The policy provided that it should be void if the insured was not the owner of the property. The property had been deeded to the insured, and the deed left with another to be delivered to her, but it was not delivered till after the fire. *Held* that she was the owner. *Id.*
9. POWER OF ADJUSTING AGENT TO WAIVE CONDITIONS. Where a claim for loss of insured property is placed by the company in the hands of an agent for adjustment, it will be presumed that he is authorized to do whatever is required to be done in adjusting the loss; and, in this case, *held* that such an agent was presumed to have authority to waive the requirement of the policy as to keeping books and invoices in a fire-proof safe. (*Hollis v. State Ins. Co.*, 65 Iowa, 454, *distinguished*). *Brown v. State Ins. Co.*, 428.
10. WAIVER OF CONDITIONS OF POLICY: WHAT AMOUNTS TO. Where a policy of fire insurance required the insured to keep his books and invoices in a fire-proof safe, or in such a manner as to avoid danger of their being destroyed with the insured property; but he kept them in a wooden desk in the building with the insured goods, and they were all burned together; *held* that the company waived the requirement, when, upon being informed of the facts, it demanded that the insured obtain, and induced him to incur trouble and expense in procuring, duplicates of the burned invoices, to be used instead of the originals in adjusting the loss. (*Hollis v. State Ins. Co.*, 65 Iowa, 454, *followed*, and *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335, *distinguished*). *Id.*

11. **WARRANTY AGAINST INCUMBRANCE : BREACH : JUDGMENTS PAID BUT NOT SATISFIED.** The insured in her application warranted that the insured property was not incumbered. There were four judgments against the property which were not satisfied of record, but it was shown that the sheriff had collected and paid over to the judgment creditors the amounts of two of them, and that the judgment debtor in the other two had the receipts of the judgment plaintiffs acknowledging satisfaction of their judgments. *Held* that no breach of the warranty was shown. *Lang v. Hawkeye Ins. Co.*, 678.
12. **WARRANTY OF OWNERSHIP : BREACH : PENDING ACTION TO ESTABLISH A LIEN.** A warranty of sole and undisputed ownership, in an application for insurance, was not broken by the fact that an action was pending to subject the property to the payment of a judgment obtained against a former owner, after he had conveyed it, on the ground that he had conveyed it for the purpose of hindering and defrauding his creditors ; since such action did not question the ownership, but only sought to establish a lien. *Id.*
13. **DWELLING-HOUSE : BREACH OF CONDITION AS TO OCCUPANCY.** The insured property was a dwelling-house occupied by a tenant. The policy provided that it would be void if the property became "wholly or partially vacant, or unoccupied, or occupied for purposes not indicated in the written part of the policy." The tenant moved out September 26, and the property was burned on the night of October 1, following. The owner, who lived a mile and a half distant, spent a part of each intervening day in examining and cleaning the house, but did not stay there at night ; and her father, who worked near, left an axe and grub-hoe in the house at night. Otherwise the house was unoccupied. *Held* that there was a breach of the conditions of the policy, and that no recovery could be had thereon. (See opinion for cases followed and distinguished). *Feshe v. Council Bluffs Ins. Co.*, 676.
(2) *Life Insurance.*
14. **TAXATION OF COMPANY'S MONEYS AND CREDITS : WHAT TO BE DEDUCTED AS INDEBTEDNESS.** So much of the assets of a life insurance company as consists of securities for loans, notes taken for premiums, municipal bonds and warrants, and cash and cash items, is taxable as money and credits ; but in listing such money and credits for taxation, the debts of the company should be deducted ; and among such debts are (1) the debt of the company to its stockholders,—being the amount which the stockholders would be entitled to receive upon a present distribution of the money and credits of the corporation ; and (2) the amount which it owes to its policy-holders, and that is equal to and represented by the reserve fund which the statutes of the state require to be kept. Accordingly, where, as in this case, the amount of such debts exceeds the amount of money and credits, the company is not taxable at all on account of money and credits. *Equitable Life Ins. Co. v. Board of Equalization*, 178.
15. **ACTION ON POLICY : DEFENSE : MISREPRESENTATIONS IN APPLICATION : APPLICATION NOT INDORSED ON POLICY : CHAPTER 211, LAWS OF 1880.** Action on a life insurance policy. To an answer setting up false representations on the part of the assured in his application, a demurrer was sustained, on the ground that a copy of the application was not indorsed upon, or attached to, the policy, as required by section two, chapter 211, Laws of 1880, to be done, in order to enable the company to rely upon such application, or statements therein, in defense to an action on the policy. To the ruling sustaining the demurrer defendant objects, on the ground that said chapter has no reference to life insurance companies ; but *held* that such objection was not well taken as to said section two, and that the demurrer was properly sustained. *Cook v. Federal Life Ass'n*, 746.

INTERVENTION.

See INTOXICATING LIQUORS, 8; PRACTICE IN SUPREME COURT, 43.

INTOXICATING LIQUORS.

1. **WHEN GIVING AWAY NOT CRIMINAL.** A pure and simple gift of intoxicating liquor by one to another, who is not a minor, is not a criminal act; but it becomes criminal when it is intended as a subterfuge to conceal an unlawful sale, and to evade the penalties of the law. (Compare Code, secs. 1589, 1540, 1554). *State v. Hutchins*, 20.
2. **NUISANCE: INJUNCTION: CONSTITUTIONALITY OF STATUTE.** *Jordan v. Wapello District Court*, 762.
3. **NUISANCE: PARTIES PLAINTIFF: INTERVENTION.** Where one citizen of a county has brought an action to restrain and abate a liquor nuisance, another citizen of the same county has no right to intervene and join the plaintiff in the prosecution, because the right of intervention, as given by section 2683 of the Code, must be based on a private interest; while no private interest is involved in the case referred to, but the action is brought wholly for the public benefit. *Conley v. Zerber*, 699.
4. **ENJOINING NUISANCE: REMOVAL OF PLAINTIFF FROM COUNTY.** An action to enjoin as a nuisance the sale of intoxicating liquors can be begun only by a citizen of the county where the nuisance exists, but his right to prosecute it to judgment does not cease upon his removal from the county. *Judge v. Kahl*, 486.
5. **NUISANCE: PLEADING: DENYING RESIDENCE OF PLAINTIFF.** In an action to abate a liquor saloon as a nuisance, where plaintiff shows his right to maintain the action by alleging that he is a citizen of the county, such allegation is not put in issue by a general denial, nor by (what amounts to the same thing) a denial of knowledge or information sufficient to form a belief as to the truth of the averment. (Compare *Littleton v. Harris*, 73 Iowa, 161). *Craig v. Hasselman*, 538.
6. **NUISANCE: INDICTMENT: EVIDENCE.** The indictment charged the keeping of a building with the intent to sell therein, contrary to law, intoxicating liquors, and also charged actual sales therein, but not an unlawful keeping for sale. It was shown that intoxicating liquors were kept on the premises, but no sales were proved. *Held* that the evidence of keeping was improperly admitted, because there was no allegation as to that; and that, as no sales were proved, defendant could not lawfully be convicted, because there remained nothing but the keeping of the building with an unlawful, but unexecuted, intention, which is not a punishable crime. (Compare *State v. Harris*, 27 Iowa, 430). *State v. Tierney*, 237.
7. **NUISANCE: INDICTMENT: DESCRIPTION OF PROPERTY.** An indictment charging the crime of nuisance by keeping a place for the unlawful sale of intoxicating liquors is good in the absence of averments particularly describing the place, house or building in which the nuisance is maintained; but while, upon a verdict of guilty upon such an indictment, the offender may be punished by a fine, no order for the abatement of the nuisance can be made. *State v. Waltz*, 610.

8. **NUISANCE : INSTRUCTIONS : ERROR WITHOUT PREJUDICE.** The court instructed the jury that "any building or place where any kind of intoxicating liquor is kept for the purpose of sale, or where any kind of intoxicating liquor is in fact sold, is a nuisance," without excepting those cases where such liquors may lawfully be kept and sold by persons duly authorized, and gave other instructions subject to the same objection. But since there was no claim that defendant had license to keep or sell such liquors, *held* that he was not prejudiced by the error. *State v. Wambold*, 605.
9. ——— : **EVIDENCE.** The evidence in this case (see opinion) *held* sufficient to sustain a verdict of guilty of nuisance in keeping for sale and selling intoxicating liquors. *Id.*
10. **NUISANCE : INDICTMENT : CHANGE OF REMEDIES AND PENALTIES DURING PERIOD COVERED BY INDICTMENT : CONVICTION FOR SINGLE SALE.** The indictment for nuisance in this case charged unlawful sales of intoxicating liquors on divers days between the first day of January, 1884, and the finding of the indictment, which was May 4, 1886. An amendment to the statute, which took effect July 4, 1884, provides the remedy by injunction, and that one convicted under the statute should not be released under the poor-convict law. Another amendment, which took effect April 8, 1886, increases the penalties for maintaining nuisances of this character. *Held*—
 - (1) That, since the indictment sufficiently charged a nuisance, which was, under all the said statutes, alike an indictable offense; and since the amendments only relate to penalties and proceedings to suppress the unlawful traffic, therefore the indictment was not bad on account of failing to allege under which statute the defendant was charged.
 - (2) That, since the evidence clearly showed unlawful sales after the first day of January, 1884, and before the eighth day of April, 1886, defendant was lawfully sentenced under the statute as it stood up to the last-named date.
 - (3) That an instruction that a single unlawful sale would warrant a conviction for the nuisance was not erroneous. [ROBINSON and SEEVERS, JJ., *dissenting*]. *State v. Reyelts*, 499.
11. **UNLAWFUL SALE : LIABILITY OF PROPERTY-OWNERS : KNOWLEDGE AND CONSENT.** In order to make saloon property liable for judgments based upon the unlawful sales of intoxicating liquors therein, it is sufficient to allege and prove knowledge by the owners of such property of such unlawful sales, without alleging and proving their consent. (Compare sec. 12, ch. 66, Laws of 1886). *Judge v. Flourney*, 164; *Judge v. O'Connor*, 166.
12. ——— : ——— : **KNOWLEDGE OF PARTICULAR SALE.** Property used for the unlawful sale of intoxicating liquors is liable for fines, costs and judgments assessed or rendered for violations of the prohibitory liquor laws, which occur after the owner is chargeable with knowledge that his property is being used for the prohibited purpose; and it is not necessary to show that he had knowledge of the special sale or sales on which the judgment sought to be enforced is based. *Judge v. O'Connor*, 166.

13. **NUISANCE : LIABILITY OF CHATTELS EMPLOYED : KNOWLEDGE OF OWNER : WHEN AND HOW SHOWN.** Plaintiff was the owner of certain chattels used in a building where intoxicating liquors were unlawfully sold. The nuisance arising therefrom was enjoined, and, under an execution issued upon a judgment for costs in the case, the said chattels were seized and sold. Plaintiff was not a party to the injunction suit, and he now brings this action to recover the value of the chattels, on the ground that it was not adjudicated in that case that the chattels were used in the unlawful traffic *with his knowledge*. *Held* that the chattels were liable, if they were so used with his knowledge, without an adjudication of that fact; but that the officer took them at his peril, and had the burden of establishing the guilty knowledge, when called upon so to do, in an action against him for the goods or their value. (Compare *Polk County v. Heirb*, 87 Iowa, 361, and *Cheadle v. Guittar*, 68 Iowa, 680). *Snedaker v. Jones*, 235.
14. **NUISANCE : ABATEMENT : PARTIES ONLY BOUND.** In an action to enjoin and abate as a nuisance a place where intoxicating liquors were unlawfully manufactured and sold, the court ordered the abatement, and that the furniture, fixtures and movable property on or about the premises used in the unlawful business be removed and sold, and the proceeds applied to pay the fine and costs adjudged against defendants; also that the building should be closed for one year. The defendants had only a life estate in the realty, and those entitled to the remainder were not made parties. *Held* that the decree, so far as it ordered a sale of the fixtures, was erroneous, and that, if the life estate ended within the year, the decree as to the closing of the building would cease to be operative. *Danner v. Hotz*, 389.
15. ——— : **ABATEMENT : PRIOR CESSATION.** In such case, where the defendants maintained the nuisance for more than two years after the action was begun, but ceased the unlawful business about three weeks prior to the hearing, *held* that they were nevertheless properly enjoined, and an order of abatement was properly made. (Compare *Judge v. Kribs*, 71 Iowa, 183). *Id.*
16. **SALE BY PHARMACIST : NUISANCE : STATEMENTS IN APPLICATIONS NO EXCUSE.** Where a pharmacist who has a permit to sell intoxicating liquors sells such liquors to minors and drunkards, he may be convicted of maintaining a nuisance, although such sales are made upon written applications signed by the parties and stating that they are neither minors nor drunkards. (Compare *State v. Sartori*, 55 Iowa, 340). The pharmacy act does not relieve him from the utmost rigor of the law relating to the unlawful sales of liquors. *State v. Thompson*, 119.
17. ——— : **APPLICATIONS OF PURCHASERS AS EVIDENCE.** Where a pharmacist, accused of the unlawful sale of liquors to minors and drunkards, introduced in defense the applications of purchasers, *held* that he could not afterwards have stricken from the evidence all applications the signatures to which had not been identified or proved. *Id.*
18. ——— : **REPORTS OF SALES AS EVIDENCE.** Also *held*, in such case, that the reports of sales made by the pharmacist, and signed and sworn to by him, were admissible as evidence against him, without proof of his signature. *Id.*
19. ——— : **BURDEN OF PROOF AS TO LAWFULNESS OF SALES.** A pharmacist is bound to know whether the persons to whom he sells liquors are such as he may lawfully sell to (*Dudley v. Sautbine*, 49 Iowa, 650); and the burden is on him to show that his sales are lawful. (Compare *State v. Cloughly*, 73 Iowa, 626). *Id.*

20. **NUISANCE : PHARMACIST'S REPORT OF SALES AS EVIDENCE AGAINST HIM.** Where a pharmacist holding a permit to sell intoxicating liquors is indicted for keeping a nuisance under the prohibitory liquor law, the indictment will not be set aside because the grand jury received and considered as evidence against him his monthly reports which the law required him to file with the auditor, on the ground that to use such reports against him is compelling him to testify against himself. *State v. Smith*, 580.
21. **SALE UNDER PERMIT : INCORRECT REPORTS : MISTAKE : LIABILITY ON BOND.** In an action on a bond given to procure a permit to sell intoxicating liquors, the alleged cause of action was that the defendant made false returns to the auditor. Defendant, in an amendment to his answer, stated in substance that the reports were erroneous in several particulars, but that such errors were the result of mistakes on his part. *Held* that the amendment should have been stricken out on motion, because, in an action at law at least, the penalty of the statute cannot be avoided on the ground of mistake. (Compare *State v. McEntee*, 68 Iowa, 382; *Abbott v. Sartori*, 57 Iowa, 661). *State v. Chamberlin*, 266.
22. **SALES UPON PRESCRIPTIONS UNDER PERMIT : RETURN TO AUDITOR.** The statute requires one selling intoxicating liquors under a permit to return to the auditor an account of his sales made upon physicians' prescriptions, as well as other sales. *Id.*
23. **PERMIT TO SELL TERMINATED BY REPEAL OF LAW.** The right of a pharmacist to sell intoxicating liquors under a permit is not an accrued right, within the meaning of Code, section forty-five, paragraph one, and such right, granted under the statutes in force prior to the enactment of chapter eighty-three, Laws of 1886, ceased upon the taking effect of that chapter, which repealed prior enactments relating to permits to pharmacists. (See *State v. Courtney*, 73 Iowa, 619). *State v. Mullenhoff*, 271.
24. **UNLAWFUL SALE UNDER MISTAKEN BELIEF.** The fact that defendant made the unlawful sales of liquor under the honest but mistaken belief that a permit formerly granted him was still in force, will not protect him from criminal liability. (*State v. Hayes*, 67 Iowa, 27, *distinguished*). *Id.*
25. **SALE BY NON-REGISTERED PHARMACIST UNDER PERMIT TO FIRM.** A non-registered pharmacist, who was the partner of a registered one, had no right, under chapter seventy-five, Laws of 1880, to sell intoxicating liquors under a permit held by the firm, except as an aid to, and under the supervision of, a registered pharmacist. *Id.*
26. **CRIMINAL LIABILITY OF PHARMACIST.** The fact that one is a pharmacist and holds a permit to sell intoxicating liquors will not protect him from prosecution for nuisance, if he makes unlawful sales in his pharmacy. *Id.*
27. **NUISANCE : PHARMACIST; PRESUMPTION FROM KEEPING LIQUORS.** In the prosecution of a registered pharmacist for keeping a liquor nuisance, the defendant complains of an instruction in which the court stated that the finding of intoxicating liquors in any place where merchandise is kept for sale is presumptive evidence that they are kept there for the purpose of illegal sale. *Held* no error, in view of the fact that, in the same instruction, the court plainly directed that the defendant, as a registered pharmacist, had the right to keep intoxicating liquors in his drug-store for compounding medicines, and therefore the burden rested on the state to show that such liquors were kept by defendant for unlawful purposes. *State v. Shank*, 649.

28. ——— : ——— : EVIDENCE : QUANTITY AND KIND OF LIQUORS. In such case, in determining the purpose for which the defendant kept liquors, the jury may consider the amount and kind thereof. *Id.*
29. ——— : ——— : TIME : INSTRUCTION. In such case the court instructed :—"If the evidence shows that defendant, during the time covered by this indictment, kept intoxicating liquor in his pharmacy that was in no measure useful in compounding medicine, then the presumption would be that such liquor was kept for an illegal purpose." *Held* erroneous, because the indictment covered a time when, under the statute, intoxicating liquors were lawfully kept by pharmacists for medical purposes, without the restrictions imposed by the law in force when the indictment was found. *Id.*
30. NUISANCE : ATTORNEY'S FEES : STATUTE RETROACTIVE. Although this case for the abatement of a liquor nuisance was begun prior to the enactment of the law authorizing attorney's fees to be taxed against defendants in such cases, yet, as it was tried after the enactment and taking effect of that law, attorney's fees were properly taxed. under the doctrine of *Drake v. Jordan*, 78 Iowa, 707. *Campbell v. Manderscheid*, 708.
31. ——— : ——— : AMOUNT : REVIEW. In this case, an attorney's fee of twenty-five dollars was taxed against defendant, and plaintiff, being dissatisfied with the amount, appeals. *Held* that, to justify interference by this court in such matter, a very clear showing of error would be necessary, which is not made in this case. *Id.*
32. PROSECUTION : SEVERAL COUNTS IN ONE INFORMATION : ATTORNEY'S FEES. An attorney selected by a peace officer, for appearing before a justice of the peace and prosecuting a defendant for the unlawful sale of intoxicating liquors, is entitled to only five dollars, under section 3829 of the Code, no matter how many distinct offenses, stated in as many counts, are charged in the information upon which the prosecution is based. (Compare Code, sec. 1540). *Schulte v. Keokuk County*, 292.
33. INJUNCTION : CONTEMPT : COMMITMENT IN VACATION. See Constitutional Law, 1.

JUDGES.

SUCCESSION OF : CERTIFYING EVIDENCE FOR APPEAL. See Practice in Supreme Court, 8, 4.

JUDGMENT.

1. IN EXCESS OF ISSUES : NO PREJUDICE. A decree which goes beyond the question submitted to the court is erroneous in that respect, but where such error is not prejudicial to appellant, it is no ground of reversal. In this case, appellant has leave to have the decree amended, at his costs, upon the remanding of the cause. *McReynolds v. McReynolds*, 89.
2. ORIGINAL NOTICE : DISCREPANCY IN NAME. Where the defendant in an action was the wife of G. B. L., and she was described in the original notice and the officer's return of service thereon as Mrs. G. B. L., but her own proper name was Ora M. L., and judgment by default was rendered against her as Ora M. L., *held*, in the absence of a showing that she was not equally well known by both names, that she could not assail the judgment in a collateral proceeding on the ground that the notice had not been served upon her. *Peterson v. Little*, 223.

3. EVIDENCE OF RENDITION AND TERMS OF. Parol evidence is not admissible to establish that a judgment was rendered, nor to prove its terms. *Cadwell v. Dullaghan*, 259.
4. PARTY IN INTEREST: EVIDENCE. Where it was material to determine the rights between the parties, it was competent for plaintiff to testify that, by agreement between himself and defendant, a certain action was brought in his name for the accommodation of defendant, and that he (plaintiff) had no interest in the subject-matter thereof. *Id.*
5. WHEN RENDERED: RECITAL OF DATE CONTRADICTED BY CLERK'S FILING. Where a decree recited that it was rendered on a certain date, *held* that the date of its rendition could not be contradicted by the clerk's certificate as to the time of filing it. (Compare *Holmes v. Budd*, 11 Iowa, 109; *Mornyer v. Cooper*, 85 Iowa, 260). *Buck v. Holt*, 294.
6. BY DEFAULT: SETTING ASIDE: DILIGENCE OF ATTORNEY. While a sufficient ground for making default must always be shown before judgment thereon will be set aside, yet a mistake of the party's attorney, even though it relates to a matter concerning which he is charged by law with notice, may afford sufficient ground of excuse. So, also, may an assurance by the judge as to the course which will be pursued in the cause, even though unauthorized, if it has in good faith been acted on by the attorney. (See opinion for illustration). *Jean v. Hennessy*, 348.
7. ———: ———: AFFIDAVIT OF MERITS: SUFFICIENCY: FORMER ADJUDICATION. While a party seeking to set aside a judgment by default cannot rely, for a showing of merits, upon a mere general statement that he has a good defense, yet an affidavit to the effect that all the matters alleged in the petition as grounds for the action were involved and adjudicated in a former action between the same parties, is *held* sufficient. *Id.*
8. ———: ———: AFFIDAVIT BY ATTORNEY. An attorney of a party against whom judgment by default has been rendered may make an affidavit of merits, upon a motion to set it aside, when he is acquainted with the facts. *Id.*
9. VACATION: NEWLY-DISCOVERED EVIDENCE. Plaintiff made default in an action against him, although he knew that the debt on which he was sued had been paid and that receipts had been given therefor. In an action to set aside the judgment rendered on the default, he alleged that he was not able to find the receipts prior to the rendition of the judgment, but that he had since found them; but he did not allege facts showing due diligence in searching for the receipts. *Held* that he was not entitled to a new trial, under section 3154 of the Code, on the ground of newly-discovered evidence. *Heathcote v. Haskins*, 566.
10. ———: UNAVOIDABLE CASUALTY OR MISFORTUNE. Where one is aware of the nature of the claim asserted against him in an action at law, and of the disadvantage under which he labors on account of being a foreigner and unacquainted with the English language, and yet neglects to seek information from others who are informed; and where he knows that the debt has been paid and receipts given therefor, and he makes some effort to find the receipts but is unable to find them, and he makes default and judgment is rendered thereon, he cannot, under section 3154 of the Code, have the judgment set aside on the ground of unavoidable casualty or misfortune, especially where he fails to show that he made due effort to find the receipts, or that he could not have proved the fact of payment by other evidence. *Id.*

11. **FOUNDED ON FALSE TESTIMONY: VACATION.** Where a defendant in an action knows in advance that the claim asserted against him has been paid, and that judgment can be had only upon false testimony, and knows of the existence of evidence by which the false testimony can be rebutted, but he neglects either to produce that testimony or to assert his defense, but allows judgment by default to go against him, he cannot afterwards have the judgment vacated because it was obtained on false testimony. *Id.*
 12. **VACATION: NEWLY-DISCOVERED EVIDENCE.** Where a minor was defendant in an action at law, and the court appointed a guardian *ad litem* to answer for him, and an answer was filed denying the allegations of the petition, but neither the minor nor his guardian *ad litem* knew that the debt had been paid, and judgment was rendered against the minor, but afterwards they discovered the fact of payment and the evidence by which it could be proved, *held* that the judgment was properly vacated and a new trial granted, under section 3154 of the Code. *Heathcote v. Haskins*, 570.
 13. **DATE OF.** See Appeal, 2.
 14. **IN CRIMINAL CASE.** See Criminal Law, 32.
 15. **OF OTHER STATE: COLLATERAL ATTACK.** See Divorce, 1.
 16. **DECREE IN EQUITY UNDER GENERAL PRAYER.** See Mistake, 2.
- See **FORMER ADJUDICATION: NEW TRIAL**, 1, 2; **REPLEVIN**, 1, 3; **WILLS**, 11.

JUDICIAL SALE.

1. **INADEQUACY OF PRICE: VALIDITY.** Gross inadequacy of price alone is not sufficient to avoid an execution sale. (See cases cited in opinion). The period of redemption fixed by statute is ample protection to the debtor in such cases. *Peterson v. Little*, 228.
2. **PROPERTY HELD IN TRUST FOR CORPORATION: TRUSTEES NOT PARTIES.** Land was deeded in trust to the trustees of a corporation, and the deed imposed upon them duties in regard to the land different from their duties as trustees of the corporation. The land was sold upon the foreclosure of a mechanic's lien against the corporation, the trustees not being made parties to the action. *Held* that the sale was void as to them as trustees under the deed, and neither divested them of the title nor terminated the trust. *Butterfield v. Wilton Academy*, 515.

See **SALES**, 1.

JURISDICTION.

1. **OF SUPREME COURT.** See Appeal, 1-9.
2. **OF FEDERAL COURT ON REMOVAL OF CAUSE.** See Former Adjudication, 6.

See **EQUITY**, 1; **JUDGMENT**, 2.

JURORS AND JURY.

1. **RIGHT TO RETURN SPECIAL VERDICT.** The jury may, in their discretion, return a special verdict. (Code, sec. 2808). *Hall v. Carter*, 364.
2. **KEEPING JURY TOGETHER.** See Criminal Law, 22.

See **JUSTICES AND THEIR COURTS**, 1.

JURY TRIAL.

1. **RIGHT TO IN SUPERIOR COURT : TRIAL BY TWELVE : CONDITIONS.** The constitutional right to a trial by a jury composed of twelve persons is not violated by section sixteen, chapter 143, Laws of 1876, as amended by section six, chapter twenty-four, Laws of 1882, providing that the jury for the trial of causes in the superior court shall consist of six qualified jurors, unless one of the parties demands a jury of twelve; but that the party making such demand, to entitle him to a trial by twelve, must deposit with the clerk an amount sufficient to pay the additional expense caused thereby. (Compare *Adae v. Zangs*, 41 Iowa, 536; *Steel v. Central Iowa Ry. Co.*, 48 Iowa, 109). *Connors v. Burlington, C. R. & N. Ry. Co.*, 888; *City of Creston v. Nye*, 869.
2. **CONTEMPT.** A person held to answer for a contempt is not entitled to a trial by jury. *McDonnell v. Henderson*, 619.
3. **WAIVER BY ACCUSED.** See Criminal Law, 4.

JUSTICES AND THEIR COURTS.

1. **TAKING CASE FROM JURY.** A justice of the peace has no power to take a case from a jury and dismiss it on the ground that the evidence shows that there is no cause of action. (See cases cited in opinion). *Hunt v. Farmers' Ins. Co.*, 231.
2. **APPEAL FROM : PRACTICE.** See Criminal Law, 4, 5.

LAND.

See REAL ESTATE.

LARCENY.

See CRIMINAL LAW, 43.

LEVY.

See SALES, 1.

LIBEL.

See SLANDER AND LIBEL, 7.

LIENS.

See PRIORITY OF RIGHTS.

LIFE INSURANCE.

See INSURANCE, 14, 15.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

MALICE.

See ASSAULT AND BATTERY, 1, 2; CONSTABLES, 1.

MALICIOUS PROSECUTION.

GOOD FAITH: ADVICE OF COUNSEL: GENERAL AND SPECIAL VERDICTS.

In an action for malicious prosecution, the court instructed that defendant was not liable if, before beginning the prosecution, he (1) laid all the facts before his attorney, and (2) acted in good faith upon the opinion of such attorney, and (3) he himself believed that there was cause for the prosecution. In answers to special interrogatories, the jury found the first two conditions for defendant, but the third one was not specially submitted to them; and the general verdict was for the plaintiff. *Held* that the effect of the general verdict was that defendant did not himself believe that there was cause for the prosecution, and that this was not inconsistent with the special findings. The court, also, without specially passing upon the point, inclines to think that the instruction was a correct statement of the law. *Acton v. Coffman*, 17.

MANDAMUS.

1. BY PRIVATE CITIZEN TO CONTROL LOCATION OF RAILROAD: PUBLIC INTEREST THE TEST. Plaintiff, a resident taxpayer of the town of Polk City, for himself and others, sought to compel the defendant to relocate its main line of railroad so as to run through said town, on the ground that it had originally been so located, and had been aided in its construction by a tax raised in the township, and also by a grant of lands from the county, all upon the condition that it should run by Polk City. *Held* that, unless the interests of the general public were shown to be injuriously affected by defendant's removal of its main line from said town, while it yet gave the town railway facilities by means of a branch, plaintiff was not entitled to the relief asked,—his personal damage, if any, not being ground for such relief. *Crane v. Chicago & N. W. Ry. Co.*, 830.
2. TO COMPEL ASSESSMENT TO PAY LOSS. See Insurance, 5.

MARRIED WOMEN.

See HUSBAND AND WIFE; PERSONAL INJURIES, 1.

MASTER AND SERVANT.

1. WORK DONE ON FARM: EVIDENCE. In an action for services upon a farm during a series of years, where others were also employed during the time, evidence tending to show that the defendant had a large farm and a large number of cattle and horses was immaterial. *Stanley v. Barringer*, 34.
2. ———: SUFFICIENCY OF PAYMENT: SERVANT'S SATISFACTION. In such case, where the servant testified in part as to what he had received for his services, and stated that he, at the time, thought that he was well enough paid, and that he would have been satisfied had it not been for the influence of other parties, *held* that, in the absence of any showing of fraud or undue influence, he was not entitled to recover. *Id.*

See RAILROADS, 33-40.

MECHANICS' LIENS.

1. FOR LUMBER FOR SIDEWALK ON STREET. One who under contract with the owner of a town lot, furnishes lumber for the construction of a sidewalk on the street along and adjacent to the lot, cannot have a mechanic's lien upon the lot for the price of the lumber, the improvement not being upon the lot. *Coenen v. Staub*, 32.

2. **DESCRIPTION OF PROPERTY.** Where, in the statement filed with the clerk of the court as the foundation for a mechanic's lien, the description of the property to be charged was as follows: "Thirty lengths of corn-cribbing at Mills Station, Pottawattamie county, Iowa," *held* that it was too indefinite for the purpose. (See Laws of 1876, chap. 100, sec. 6). *Roose v. Billingsly & Nanson Com. Co.*, 51.
3. **LUMBER FOR NUMEROUS BUILDINGS: APPLICATION OF MATERIAL: SUBSEQUENT PURCHASER.** Where lumber was furnished for the erection of numerous corn-cribs at several different places, and the cribs were afterwards sold to another party, *held* that, if any of them were complete when purchased, and it was not shown that any of the lumber furnished within ninety days of the purchase went into such completed cribs, then the purchaser took them free from any lien for the lumber,—no statement for a lien having been filed until after the purchase. *Id.*

MINORS.

See JUDGMENT, 12; REAL ESTATE, 1.

MISTAKE.

1. **OVERPAYMENT TO HUSBAND AND WIFE: WHO LIABLE.** On a sale of land by a husband and wife, there was an overpayment, by mistake, of the purchase money. If they were not joint owners of the land, it does not appear which of them owned it. The written contract of sale, and the deed which was made in consummation of it, were drawn as if both were equally, and in the same capacity and degree, owners, and the money was paid when both were present, and passed into the custody of the wife, who the next day deposited a part of it in bank and loaned a part. *Held* that these facts justified a verdict and judgment against the wife for the amount of the overpayment. *Johnson v. Leffingwell*, 114.
2. **SETTLEMENT: CORRECTION IN EQUITY: RELIEF UNDER GENERAL PRAYER.** Defendant was owing plaintiff's intestate on two separate accounts, one for sums due, and the other for sums not due. In settling the accounts, there was a dispute as to whether certain items which defendant had placed in the second account should not be placed in the first, and they were finally so placed, but they were not deducted from the second account, and defendant, in writing, then agreed to pay the amounts of the two accounts, as they then stood—the one at a time stated, and the other when the several items should become due. Afterwards defendant was sued upon the agreement for the amount agreed to be paid on the first account, and it filed a cross-petition alleging a mutual mistake in the written agreement, in that a credit of a stated sum was erroneously allowed to plaintiff, whereby the amount agreed to be paid on the first account was too large, and asking for a correction of the agreement, and "for such other and further relief as may be in keeping with equity and good conscience." *Held*—
 - (1) That the evidence (see opinion) established a mutual mistake, not in the amount agreed to be paid on the first account, but in failing to deduct from the second account the items transferred from it to the first.
 - (2) That although defendant in its cross-petition alleged the mistake to be in the first account, and asked relief as to that, yet, under its prayer for general relief, it was entitled to have the agreement reformed, by deducting from the sum agreed to be paid on the second account the sum of the items which had been transferred from it to the first account. *Worsley v. Burlington Ins. Co.*, 464.

See ADVERSE POSSESSION, 3.

MORTGAGE.

See CHATTEL MORTGAGE.

MUNICIPAL CORPORATIONS.

See CITIES AND TOWNS; COUNTIES.

MURDER.

See CRIMINAL LAW, 49-63.

NEGLIGENCE.

1. INSTRUCTIONS : PARTIAL STATEMENT OF ISSUES. In an action based on negligence, where the answer charged plaintiff with contributory negligence, it was error, in stating the issues to the jury, to omit the issue of contributory negligence. (See cases cited in opinion). *Gamble v. Mullin*, 99.
2. INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE. In such case, the jury were instructed that if the injury complained of was caused by defendant's negligence, and plaintiff did not, by any negligence of his own, contribute to the injury, they should find for the plaintiff; but in at least two paragraphs of the charge they were told, without qualification, that plaintiff was entitled to recover if the injury was the result of defendant's negligence; and in no part of the charge were they plainly told that contributory negligence on plaintiff's part would defeat his recovery. *Held* that the charge did not sufficiently state the law on this point. *Id.*
3. ——— : BURDEN OF PROOF. In such case, it was not sufficient to instruct that plaintiff had the burden to prove the negligence alleged by him, as it was incumbent on him, also, to prove himself free from contributory negligence, even though such negligence was charged upon him in the answer. (See cases cited in opinion). *Id.*
4. AS TO STREETS AND SIDEWALKS. See Cities and Towns, 1-8.
See DAMAGES, 1; RAILROADS, 20-46.

NEW TRIAL.

1. ABSENCE OF COUNSEL : ACCIDENT : DISCRETION OF COURT. When this cause came on for trial, defendant's counsel was engaged in an important criminal cause in a distant county, though he had, twenty-five days before, been subpoenaed by plaintiff as a witness in this case, and his fees paid. He, therefore, committed this case to another attorney, who lived in the same city with himself, and who undertook to be present and attend to the case for defendant. He failed, however, to arrive until after trial and judgment against defendant, which was on the second day of the term. It was not a physical impossibility for him to have been present at the time of the trial. But *held* that the court, upon a motion for a new trial, had a right to take judicial notice of the state of the weather and of the condition of the docket, in determining whether he was negligent or not, and that, exercising the usual presumption in favor of the lower court in such cases, an order sustaining the motion for a new trial could not be disturbed on appeal. *First Nat. Bank v. Harwick*, 227.
2. SHOWING OF MERITS : ANSWER OF GARNISHEE. Where judgment has been rendered against a garnishee in his absence, upon his answer, which is on file in the case, a new trial may be granted without any other showing of merits than is made by such answer. *Id.*

3. **VERDICT CONTRARY TO INSTRUCTIONS.** Where a verdict is contrary to the instructions of the court, whether those instructions are right or wrong, it may properly be set aside and a new trial granted. *Crane v. Chicago & N. W. Ry. Co.*, 330.
4. **NEWLY-DISCOVERED EVIDENCE: LACHES.** After a verdict had been rendered for the value of a lot of oats, defendant had them weighed, and found that they were of less value than found by the jury. *Held* that, as this newly-discovered evidence of their value was ascertainable before the trial, it was no ground for a new trial. *Norris v. Hix*, 524.

See JUDGMENT, 6-12.

NOTICE OF EQUITIES.

See CHATTEL MORTGAGE, 7; MECHANICS' LIENS, 3; SALES, 1, 2; VENDOR AND VENDEE, 1.

NUISANCE.

1. **ON PUBLIC GROUND: FACTS CONSTITUTING.** The city of Des Moines, by ordinance, leased to defendant, for "railway depot purposes," a portion of ground lying within the city and dedicated to the general public, reserving, however, the "right of way to and over the bridge at the mouth of Coon river; also the right to use so much of said grounds as may be necessary to use in the repair of the same, or for rebuilding a bridge, in case the necessity of the same should ever arise. The city also reserves the right to provide by resolution for the necessary repair and good condition of the road leading to said bridge, and to provide that the same shall be kept in good repair and condition by said railroad company for public travel." The defendant built a round-house and turn-table on the ground (which structures were not within the terms of the lease) in such a way as to interfere with the customary travel over said ground to plaintiffs' place of business. *Held* that it was the intent of the city, as expressed in the ordinance, that the defendant and the general public should jointly use and occupy the grounds for highway purposes, and that the round-house and turn-table constituted a nuisance for which plaintiffs were entitled to damages, and which the court properly ordered to be removed. *Platt v. Chicago, B. & Q. Ry. Co.*, 127.
2. **PUBLIC: PRIVATE ACTION.** A nuisance may be both public and private, and, if an individual suffers special damages thereby, he may maintain an action therefor. (Compare *Park v. C. & S. W. Ry. Co.*, 43 Iowa, 636). *Id.*
3. **DAMAGES: ORDER FOR REMOVAL.** The court, in an action for nuisance, rendered judgment on the verdict for damages, and on motion ordered the nuisance abated. Although the verdict did not necessarily determine the continued existence of the obstruction, it was conceded on the trial. *Held* that the order of removal was not erroneous. (Compare *Miller v. Keokuk & Des M. Ry. Co.*, 63 Iowa, 680). *Id.*
4. **TEMPORARY: MEASURE OF DAMAGES.** In an action for damages to a dwelling-house caused by a nuisance which is not necessarily a permanent one, but which the defendants may at any time abate, the measure of damages is the depreciation in the rental value of the premises during the time the nuisance is maintained. *Shively v. Cedar Rapids, I. F. & N. W. Ry. Co.*, 169.

5. **DAMAGES : STOCK-YARDS NEAR DWELLING : NECESSITY OF RAILROAD.** Where the defendants erected stock-yards so near to plaintiff's dwelling, and so kept them, that the odors therefrom were not only an annoyance, but were unwholesome, threatening the health of plaintiff and his family, *held* that defendants could not escape liability on the ground that the yards were necessary to the operation of defendants' railroad, and that the odors complained of could not be avoided, there being no showing of such facts in defense. (*Dunsmore v. Cent. Iowa Ry. Co.*, 72 Iowa, 182, *distinguished*). *Id.*

See INTOXICATING LIQUORS, *passim*.

OCCUPYING CLAIMANT.

1. **COLOR OF TITLE : WHAT IS.** The plaintiff procured a judgment against defendant for the possession of the land in controversy. There was evidence sufficient to show that the defendant was in the occupancy of the land when the judgment was rendered, and that at that time more than two years had elapsed since he had paid the taxes on the land, and that plaintiff never offered to repay the same to him. *Held* that these facts were sufficient, under Code, section 1983, to show color of title in defendant, so as to entitle him to recover for improvements made under the occupying claimant law. *Finnegan v. Campbell*, 158.
2. **RECOVERY FOR IMPROVEMENTS : REMEDY : PRACTICE.** An occupying claimant of land, when made a defendant in an action to quiet title in another, cannot in that action set up his claim for improvements, but must wait until the question of title is determined against him. (See *Fogg v. Holcomb*, 64 Iowa, 628). *Buck v. Holt*, 294.

See TAX SALE AND DEED, 11, 12.

OFFICER.

OPPRESSION BY : ACTION ON BOND. See Constable 1.

See COUNTY TREASURER.

ORIGINAL NOTICE.

1. **SUFFICIENCY.** See Former Adjudication, 2.
2. **DISCREPANCY IN NAME.** See Judgment, 2.

PARENT AND CHILD.

See BASTARDY.

PARTIES TO ACTIONS.

1. **JOINDER : SUBJECTING PROPERTY HELD BY WIFE TO HUSBAND'S DEBT.** Plaintiff held a judgment against one of the defendants; rendered in Kansas. The other defendant was his wife, to whom he had conveyed land in Iowa without consideration. *Held* that plaintiff might maintain an action in chancery against both defendants, who were non-residents, for the purpose of obtaining judgment against the husband upon the Kansas judgment, and of subjecting the land standing in the wife's name to the payment of the judgment so obtained ; since it often happens, in actions in chancery, that the same relief is not sought or granted against all the parties joined as defendants. *Taylor v. Branscombe*, 534.

2. **ERROR WITHOUT PREJUDICE.** An appellant is not entitled to have a judgment against him reversed because the trial court allows a stranger to the original action to be made a party thereto, where no prejudice results therefrom. *Clapp v. Trowbridge*, 550.

See **CHATTEL MORTGAGE**, 6 ; **INTOXICATING LIQUORS**, 8, 5 ; **MANDAMUS**, 1 ; **NUISANCE**, 2 ; **PRACTICE IN SUPREME COURT**, 45 ; **TAXATION**, 6.

PARTNERSHIP.

POWER OF PARTNER TO CONVEY FIRM PROPERTY TO PAY COPARTNER'S DEBT. A partner has no power to convey the firm property to pay the debt of his copartner, without the latter's consent ; which cannot be presumed from any supposed advantage to him of the transaction. *Brewster v. Reel*, 506.

See **EQUITY**, 1.

PAUPERS.

SUPPORT BY TOWNSHIP TRUSTEES : POWER OF SUPERVISORS TO DISCONTINUE. Under sections 1361 and 1365 of the Code, the board of supervisors of a county having a poor-house may discontinue relief to a poor person, after the township trustees have once determined that he is a proper subject for relief, and that, in their judgment, he should not be sent to the county poor-house. *Ellison v. Harrison County*, 494.

PAYMENT.

1. **APPLICATION OF : PRIOR AGREEMENT.** Plaintiff bought horses of S. and gave him for the purchase price two notes secured by mortgage on the horses. S. at once assigned the notes and mortgage to B. The next day plaintiff agreed in writing with B. to work for him, and B. agreed to apply his wages in payment of the mortgage debt. B. continued to hold the notes and mortgage until plaintiff had earned enough to cancel the debt, but, instead of applying his wages on the debt, he applied them on another account which he held against plaintiff, and assigned the notes and mortgage to defendant, who seized the horses under the mortgage. *Held*, in an action to recover the horses, that B. was bound to apply the wages on the debt, and that the law would so apply them, and that the debt was satisfied before the assignment to defendant. *Ross v. Crane*, 875.
2. **TO STRANGER : RATIFICATION BY ACTION FOR MONEY.** Where certain persons owed plaintiff, but by the false representations of defendant they were induced to pay the money to him, *held* that plaintiff could maintain an action against him for the money, because, by the very act of bringing the suit, he ratified the payment to defendant, and elected to look to him alone for the amount. *Homire v. Rodgers*, 895.
3. **EVIDENCE : ENTRIES IN CREDITOR'S BOOKS.** The entries in a person's books, showing payment in full of an account to him, are *prima-facie* evidence against him ; but where both he and the one to whom the payment is credited testify that the account has not been paid in full, and the action is against another person, the question of payment should be submitted to the jury. *Guest v. Burlington Opera-House Co.*, 457.

See **CONTRACT**, 5 ; **MASTER AND SERVANT**, 2.

PERSONAL INJURIES.

1. **MARRIED WOMAN : LOSS OF SERVICE : PLEADING AND EVIDENCE.** In an action by a married woman for a personal injury, she averred that since the injury she had been, and always would be, unable to perform any kind of work or service ; but she did not aver that she had a separate business, independent of her duties as a housewife, which alone would entitle her to damages for loss of ability to work. *Held* that, in the absence of a motion to make the petition more specific, she was properly allowed to prove that she had such separate business. *Dickens v. City of Des Moines*, 216.
2. **EXTENT OF : EVIDENCE : OPINION.** In an action for damages for a personal injury, it was competent to ask a witness, who had known the plaintiff both before and after the injury, the following question : "What, if anything, did you see in his [plaintiff's] appearance since the accident—that he was able to work as before, or otherwise?" (Compare *State v. Shelton*, 64 Iowa, 333). *Winter v. Cent. Iowa Ry. Co.*, 448.
3. ——— : ——— : **STATEMENTS OF PLAINTIFF SUBSEQUENT TO INJURY.** In such action the plaintiff cannot be permitted to prove his own statements as to the extent of his injuries, made long after the accident. *Id.*
4. **DAMAGES : LOSS OF TIME : INSTRUCTIONS WITHOUT EVIDENCE.** In such case, it is error to instruct the jury that if they found that plaintiff was by his injuries prevented from pursuing his usual business and vocation, he would be entitled to recover reasonable compensation for such loss, when there was no evidence as to the value of his time or services. *Id.*
5. **DAMAGES : PERMANENCY OF INJURY : INSTRUCTION.** In an action for a personal injury, where there was no evidence that it would be permanent, but that the plaintiff would suffer future pain and inconvenience from it, the court instructed the jury that if they found for plaintiff, and that "her injuries were permanent, they should consider such inconvenience in getting about and pain as they should find reasonably certain to result therefrom in the future, and award her such sum as damages as will reasonably and fairly compensate her therefor." *Held* that the instruction, fairly considered, was not open to the objection that it submitted the question whether the injury was permanent, on which there was no evidence ; and that it was otherwise correct. *Raben v. Central Iowa Ry. Co.*, 732.
6. **ON STREETS AND WALKS.** See Cities and Towns, 1-8.
7. **ON RAILWAYS.** See Railroads, 20-40.

PHARMACISTS.

See INTOXICATING LIQUORS, 16-23.

PLACE OF SUIT.

See VENUE.

PLEADING.

1. **AVERMENT BY NECESSARY INFERENCE.** A material fact may be pleaded either by express averment, or by the averment of other facts from which the material fact is a necessary inference. (See opinion for examples). *Homire v. Rodgers*, 895.

2. **BURDEN OF PROOF : UNNECESSARY AVERMENT IN ANSWER.** Plaintiff's intestate took cattle to pasture for the season, and turned them into a pasture leased of defendant. Defendant, claiming that he had a lien on the cattle for the rent of the pasture, collected from the owners the full amount due from them for the pasturage. Plaintiff brought this action to recover the alleged excess of the money thus collected above the rent of the pasture. Defendant in his answer pleaded affirmatively that the money collected was no more than the agreed rent. *Held* that this allegation was unnecessary, and that it was error to instruct that defendant had the burden of proof to establish it. *Id.*
3. **WHAT ADMITTED BY TENDER.** A tender by defendant in an action admits that the amount tendered is due, but does not necessarily admit all alleged grounds of recovery. Whether these, or any of them, are admitted, must be determined by the pleadings. *Griffin v. Harriman*, 436.
4. **REPETITION OF PLEA AFTER DEMURRER : PRACTICE.** Where a party pleads over after a demurrer to his plea has been sustained, and his amended pleading is the same in substance as the original, a motion to strike it from the files should be sustained. *Town of Waukon v. Strouse*, 547.
5. **EVIDENCE : VARIANCE.** In an action against a railroad company for a personal injury alleged to have been caused by the negligence of the section boss in causing the speed of the train to be increased, the evidence showed that it was the conductor who ordered the increase of speed. *Held* to be an immaterial variance, under Code, section 2686. *Rayburn v. Central Iowa Ry. Co.*, 687.
6. **IN ACTION ON OFFICIAL BOND.** See Constable, 1.
7. **IN CRIMINAL CASES.** See Criminal Law, 5, 31, 34, 37, 38, 39, 41, 42, 55 ; Intoxicating Liquors, 6, 7, 9, 32.

See INTOXICATING LIQUORS, 5 ; PERSONAL INJURIES, 1 ; PRACTICE AND PROCEDURE, 9 ; RAILROADS, 29 ; REPLEVIN, 1 ; SALES, 8.

POSSESSION.

See ADVERSE POSSESSION ; VENDOR AND VENDEE, 1.

PRACTICE AND PROCEDURE.

1. **FILING PAPERS : WHAT SUFFICIENT.** The depositing of papers with the clerk of a court, as records in a cause, is a legal filing of the papers, whether he indorses them as filed or not. (See *State v. Guisenhause*, 20 Iowa, 227, and *State v. Briggs*, 68 Iowa, 416). *Corliss v. Conable*, 58.
2. **ON WRIT OF ERROR : FINAL JUDGMENT.** Where, in an action in justice's court, there was judgment against plaintiff on a counterclaim, but it was set aside on plaintiff's motion, and defendant sued out a writ of error thereon,—whether the court, in sustaining the writ of error, properly rendered final judgment for the defendant, instead of sending the case back to the justice for further proceedings, depends upon circumstances which are not shown by the record, and so the action of the court in so doing must be affirmed. The fact that the plaintiff, after the writ of error had been sued out, perfected an appeal to the same court, which was pending therein when the writ of error was adjudicated, was not proper to be considered. *Logan v. Samsel*, 87.

3. **IMPROPER REMARKS TO JURY : ORAL DISAPPROVAL BY COURT : NO PREJUDICE.** Counsel for defendant, in argument to the jury, made unwarranted statements to the jury, to which counsel for plaintiff objected, and the judge stated orally, in the presence of the jury, that he would instruct the jury not to consider such statements ; but he failed to so instruct. *Held* that the omission was not reversible error, as the jury would not, after hearing what was said, consider the statements referred to. *Lindsay v. City of Des Moines*, 111.
4. **IMPROPER STATEMENT TO JURY : AMOUNT OF VERDICT OF FORMER JURY.** On an appeal from the award of a right-of-way jury, it is improper for counsel for plaintiff, in stating the case to the jury, to refer to the amount of the award appealed from, but such impropriety is no ground for discharging the jury on defendant's motion. It is sufficient for the court at the time, and in the final instructions, to advise the jury that their verdict should in no way be influenced by the amount of such award. *Ball v. Keokuk & N. W. Ry. Co.*, 132.
5. **ORDINANCE : CONSTRUCTION : DUTY OF COURT.** It is the duty of the court, and not of the jury, to construe an ordinance the meaning of which is involved in a pending suit. *Platt v. Chicago, B. & Q. Ry. Co.*, 127.
6. **BILL OF EXCEPTIONS : TIME OF FILING : EXTENSION BY AGREEMENT.** The time of filing a bill of exceptions may be extended by the stipulation of the parties filed in the case, and such agreement will be binding without the approval of the court. *State v. Chamberlin*, 266.
7. **—— : DIRECTING CLERK TO INSERT EVIDENCE : SHORT-HAND NOTES NOT TRANSLATED.** Evidence is not preserved for the purposes of an appeal by directing the clerk in a bill of exceptions to insert the evidence taken by the short-hand reporter and filed in the case, where the short-hand notes so filed have not been translated and the translation filed in the case. *Warbasse v. Card*, 306.
8. **ARGUMENT TO JURY : READING MOTION FOR CONTINUANCE.** It is not improper for plaintiff's counsel to read to the jury in his opening argument a motion and affidavit for continuance filed by defendant at a former term, and to comment upon the evidence expected to be furnished, as alleged in the affidavit. (Compare *Cross v. Garrett*, 35 Iowa, 486). *Hanners v. McClelland*, 318.
9. **PETITION FILED TOO LATE : RIGHT TO DISMISSAL : WAIVER BY ANSWERING.** Where the petition was not filed until after the time fixed therefor in the notice, it was error for the court to refuse to dismiss the case upon defendant's motion (see Code, sec. 2600; *Cibula v. Pitts' Sons' Manuf. Co.*, 48 Iowa, 528) ; but this error was waived by defendant's then appearing and answering the petition, thus giving the court jurisdiction of his person—it having already jurisdiction of the subject-matter of the action. *Paddleford v. Cook*, 433.
10. **EXCEPTIONS TO INSTRUCTIONS : DEFINITENESS.** An exception to an instruction, filed the day after the verdict was rendered, but which does not specify the part of the charge objected to, nor the ground of the objection, raises no question for review in this court. *Norris v. Kipp*, 444.
11. **TAKING CASE FROM JURY : WHEN ADMISSIBLE.** Before the court is warranted in directing a verdict, every fact favorable to the party against whom the verdict is asked, and which the evidence tends to prove, must be conceded. *Guest v. Burlington Opera-House Co.*, 457.

12. **BILL OF EXCEPTIONS: SKELETON: IDENTIFYING EVIDENCE.** The "skeleton" bill of exceptions in this case referred to the evidence to be inserted therein as follows: "Here insert plaintiff's evidence." "Here insert evidence of defendant." *Held* that a motion to strike the evidence inserted under such directions from the files must be sustained, because the evidence to be inserted was not identified, nor any source indicated from which it should be obtained. (See opinion for cases followed). *Wooster v. Chicago, M. & St. P. Ry. Co.*, 593.
 13. ———: **REFERENCE TO SHORT-HAND NOTES OF EVIDENCE.** Under section 3777 of the Code, the short-hand notes of the evidence, when filed with the clerk, may be referred to in a bill of exceptions, and the clerk may insert the evidence from the extended transcript made and filed by the reporter after the filing of the bill of exceptions. *Everling v. Holcomb*, 722.
 14. **FILING PAPERS: WHAT SUFFICIENT.** Section 200 of the Code, requiring the clerk, upon the filing of any paper in a cause, to make a memorandum thereof in the appearance docket, is mandatory so far as it relates to pleadings, but only directory so far as it relates to other papers; and in this case, *held* that the stenographer's notes of the evidence were to be considered as filed when they were delivered to the clerk to be kept in his office, though they were not marked "Filed," and no memorandum of the filing was made in the appearance docket. (Compare *State v. Briggs*, 68 Iowa, 416). *Id.*
 15. **BILL OF EXCEPTIONS TO RULINGS ON EVIDENCE: BY WHOM TO BE SIGNED.** A bill of exceptions to rulings on evidence in the trial of an ordinary action at law must be signed by the judge, or, in case he refuses to sign the same, by the by-standers. (Code, secs. 2831-2835). It is not sufficient that the bill be noted by the short-hand reporter and included in the extended transcript of his notes, which is certified by him. *Ind. Dist. of Fairfield v. Farmer*, 744.
 16. **IN CRIMINAL CASES.** See Criminal Law, *passim*.
 17. **FOR PRACTICE IN RELATION TO EVIDENCE.** See Evidence, *passim*.
 18. **IN DISCOVERING PROPERTY.** See Execution, 1, 2.
 19. **CERTIFYING EVIDENCE FOR APPEAL.** See Practice in Supreme Court, 3, 4.
 20. **ON APPEAL FROM BOARD OF EQUALIZATION.** See Taxation, 2.
- See APPEAL, 1, 7, 8; CONTINUANCE, 1; DEPOSITIONS, 1, 2; JUSTICES AND THEIR COURTS, 1; MISTAKE, 2; OCCUPYING CLAIMANT, 2; PLEADING, 4; TAX SALE AND DEED, 11.

PRACTICE AND PROCEDURE IN SUPREME COURT.

1. **ASSIGNMENT OF ERRORS: RULINGS ON DEMURRER: EXACTNESS.** Where a demurrer assailing a petition on several distinct grounds is sustained, an assignment of errors thereon, by simply stating that the court erred in sustaining the demurrer, is too general, under section 3207 of the Code, to raise any question for the determination of this court. (See cases cited in opinion). *Town of Waukon v. Strouse*, 547.
2. **AMENDING ASSIGNMENT OF ERRORS: TIME: COSTS.** Although an original assignment of errors may not be filed in this court later than ten days before the first day of the trial term (Code, sec. 3183), yet an amendment to such assignment may be filed, under section 2689 of the Code, upon motion for leave to do so, at any time before the submission of the cause; but, in this case, the costs incurred up to the time of filing the amendment are taxed to the appellant. *Stanley v. Barringer*, 84.

8. EVIDENCE CERTIFIED BY JUDGE AFTER TERM EXPIRED. A judge has no authority, after his term of office has expired, to certify to this court the evidence in a case tried before him while in office. *Pattersonville Ed. Inst. v. Coad*, 710.
4. EVIDENCE CERTIFIED BY SUCCESSOR OF TRIAL JUDGE : DEFECTIVE IDENTIFICATION. Whether the successor in office of the judge who tries a case may certify the evidence for the purposes of an appeal, *quaere* ; but, at all events, the certificate so made in this case must be disregarded, because it is not entitled as in any case, and does not purport to be attached to the evidence, nor to identify it in any way. *Id.*
5. APPEAL : NOT SHOWN BY ABSTRACT. Where the abstract does not state or show that an appeal was taken, this court cannot entertain the case, except to dismiss it. *Names v. Names*, 213.
6. EQUITY CASE : EVIDENCE WANTING. A cause triable *de novo* in this court cannot be considered where it is not averred or shown that the abstract contains all the evidence. *Id.*
7. EQUITY CASE : DEFECTIVE ABSTRACT : BILL OF EXCEPTIONS. In a cause triable *de novo* in this court, while a formal bill of exceptions is not required, it should appear that the evidence offered below was duly made a part of the record, and that the abstract presented here is full and correct, not only as to the evidence, but as to the whole record. And where appellant's abstract purported to be a full and correct abstract of the whole record, but appellee's abstract denied this statement, and averred that both abstracts together did not present a full and correct abstract of the record, and appellant, in an amended abstract, did not controvert the denial of the appellee, *held* that appellee's denial must stand, and that the cause could not be tried *de novo*. *Hunter v. City of Des Moines*, 215.
8. WHAT EVIDENCE TO BE CERTIFIED. Where the appellant in a law action seeks to have the judgment reversed on the ground that the court erred in dismissing the case on the evidence given and received, it is not necessary or proper to bring to this court the evidence offered but not received. (Code, sec. 2741). *State v. Chamberlin*, 266.
9. TRIAL DE NOVO : IMMATERIAL EVIDENCE WANTING. A trial *de novo* will not be refused in this court on the ground that the evidence is not all in the record, where it appears that the missing evidence is immaterial. (Compare *Palo Alto County v. Harrison*, 68 Iowa, 86). *Buck v. Holt*, 294.
10. TRIAL DE NOVO : DEFECTIVE ABSTRACT. A cause cannot be tried on its merits in this court where appellant's abstract shows on its face that it does not contain all the evidence offered by his adversary in the court below, even though the abstract states that it contains all the evidence. *Hart v. Hart*, 487.
11. REVIEWING INSTRUCTIONS WITHOUT EVIDENCE. Where instructions complained of are applicable to the issues raised by the pleadings, they may be reviewed in this court, even though the evidence is wanting ; for this court will, in such case, presume that there was evidence warranting the instructions. (See *McMillan v. Burlington & M. R. Ry. Co.*, 40 Iowa, 231). *Warbasse v. Card*, 306.

12. **DELAY IN FILING ABSTRACT AND ARGUMENT : MOTION TO AFFIRM.** It is not the practice of this court to affirm causes summarily on motion, after they are prepared for submission on the part of appellants, on the ground of delay in presenting abstracts and arguments. If prejudice has resulted to the other party by such delay, redress must be sought in some other way. (See Code, sec. 8181; Laws of 1874, chap. 56). *Fowler v. Town of Strawberry Hill*, 644.
13. **MOTION TO STRIKE MATTER FROM AMENDED ABSTRACT.** A motion to strike out a portion of appellee's amended abstract, on the ground that it contains matter not contained in the transcript, is not passed on, for the reason that the original abstract sufficiently shows the fact intended to be shown by the amendment. *Id.*
14. **CHALLENGING RECORD AFTER AMENDMENT.** Where appellee, in an amended abstract, set out portions of the evidence which he claimed were omitted from appellant's abstract, *held* that he could not then be permitted to deny that the evidence was properly preserved, or to say that it was not all before the court. (See cases cited in opinion.) *Connors v. Burlington, C. R. & N. Ry. Co.*, 883.
15. **ORDER SETTING ASIDE INDICTMENT : EVIDENCE IN ABSTRACT.** Where a motion to set aside an indictment is based on a certain alleged fact, and is sustained, and the state appeals, and admits in its abstract that the allegation on which the motion was based is true, this court can review the ruling, and it is not necessary that the abstract should contain all the evidence submitted to the court below in support of the motion. *State v. Smith*, 580.
16. **RECORD AS TO MISCONDUCT OF COUNSEL.** This court cannot consider alleged misconduct of counsel on the trial below when the only evidence of such misconduct contained in the record is in the form of affidavits made by the attorney of the appellant. (Compare *Rayburn v. Central Iowa Ry. Co.*, ante, p. 637). *Hall v. Carter*, 864.
17. **COMPLAINT OF MISCONDUCT OF COUNSEL : RECORD.** This court will not consider complaints of the misconduct of counsel in the court below where the facts are not shown by proper certificate or bill of exceptions, given by the trial court. Affidavits will not be considered. (*Rayburn v. Central Iowa Ry. Co.*, ante, p. 637, followed). *Fowler v. Town of Strawberry Hill*, 644.
18. **COMPLAINT OF MISCONDUCT OF COUNSEL BELOW : RECORD.** Where an appellant intends to ask this court to reverse a cause on account of improper language used by counsel in argument to the jury, correct practice requires that the court below shall certify the facts and language complained of, and the question cannot properly be raised in this court upon affidavits of counsel and others. *Rayburn v. Central Iowa Ry. Co.*, 637.
19. **COSTS OF AMENDED ABSTRACT.** Where appellant assigned sixty-four errors, but insisted on only five or six of them, appellee was warranted in making preparation against the whole sixty-four, and the costs of his amended abstract, reasonably prepared and filed for that purpose, were properly taxed to appellant upon an affirmance of the judgment. *Id.*
20. **AFFIDAVITS TO VARY TRANSCRIPT.** Where a transcript filed in this court appears to be full and complete, with a proper certificate to the evidence, and it is duly certified by the clerk of the trial court to be a "full, complete and perfect transcript," it cannot be varied or changed by affidavits of the clerk of the trial court, or others, to the effect that the judge's certificate and the short-hand reporter's extension of his notes have not been filed in the court below: *Corliss v. Conable*, 58.

21. **FILING AMENDMENT TO ABSTRACT : LEAVE : TIME.** Where the matter contained in an amendment to appellant's abstract was sufficiently identified as a part of the record, leave of the court to file it was not necessary, nor did the mere fact that it was filed after the cause had been argued by appellee entitle the latter to have it stricken from the files. (Compare *Frost v. Parker*, 65 Iowa, 178, and *Palo Alto County v. Harrison*, 68 Iowa, 81). *Harl v. Pottawattamie County Mut. Fire Ins. Co.*, 39.
22. **ABSTRACT NOT DENIED.** A statement made in an abstract filed by the appellee, and which is not denied, will be taken as true. *Acton v. Coffman*, 17.
23. **EVIDENCE TO SUSTAIN FINDING OF COURT.** Where there is a fair conflict in the evidence on which the finding of the court in an ordinary action is based, it will not be disturbed on appeal for want of support in the evidence. *Coffman v. Acton*, 147 ; *Thompson v. Maxwell*, 415 ; *Garretson v. Eq. Mut. Life & End. Ass'n*, 419.
24. **FINDING OF COURT : EVIDENCE TO SUPPORT.** The finding of the trial court, in an ordinary action, upon a question of fact, has the force and effect of the verdict of a jury, and cannot be set aside on appeal if there is evidence upon which, fairly considered, it can be sustained. *Warfield v. Warfield*, 184.
25. **EVIDENCE TO SUPPORT VERDICT.** Where the evidence is conflicting, this court will not interfere with a verdict on the ground that it is not sustained by the evidence. *Schaben v. Brunning*, 102 ; *Johnson v. Leffingwell*, 114 ; *Dickens v. City of Des Moines*, 216 ; *Norris v. Kipp*, 444.
26. **EVIDENCE TO SUPPORT VERDICT.** Since this court is not able to conclude that the jury, in the honest, intelligent and unbiased exercise of their discretion, were not justified by the evidence in finding for the plaintiff, their verdict cannot be disturbed. *Haskell v. City of Des Moines*, 110 ; *Howes v. Axtell*, 400.
27. **VERDICT : EVIDENCE TO SUSTAIN.** A verdict which finds some support in the evidence will not be set aside on appeal on the ground that it is not sustained by sufficient evidence. *Morris v. Burley*, 45.
28. **EVIDENCE TO SUPPORT VERDICT.** Since it cannot be said that there was such a want of evidence in this case that the jury, in the exercise of their discretion, could not have found the defendants guilty, this court cannot reverse the judgment for a want of evidence. *State v. Maher*, 82.
29. **OBJECTIONS TO EVIDENCE NOT URGED BELOW.** Where evidence is objected to below on a certain stated ground, another ground not so stated cannot be urged on appeal. *Id.*
30. **QUESTION NOT RAISED BELOW.** An issue not raised in the pleadings nor referred to in the evidence cannot be heard in this court. *Richardson v. Woodring*, 149,
31. **QUESTIONS NOT RULED ON BELOW : EXAMPLE.** The issues raised and tried below, in an action to recover money as specific personal property, were whether defendant had received the money into his actual possession and assumed the care of it ; and whether she had it in her possession when the action was brought ; and the court found generally for defendant. *Held* that, on this state of the record, the question whether the action would lie, when the property sought to be recovered was money, could not be considered on appeal. *Coffman v. Acton*, 147.

82. **PLEADING : OBJECTIONS NOT RAISED BELOW.** A motion to strike out a division of a plea on the ground that it is irrelevant and immaterial, and which is erroneously sustained on that ground in the lower court, cannot be sustained in this court on another ground ; *e. g.*, that it does not state a cause of action. *Irwin v. Yeager*, 174.
83. **OBJECTIONS TO EVIDENCE : WHAT CONSIDERED ON APPEAL.** Only such objections to evidence as are made on the trial will be considered on appeal. (Compare *Jaffray v. Thompson*, 65 Iowa, 326 ; *Taylor v. Wendling*, 66 Iowa, 562). *Bothwell v. Farwell*, 324.
84. **LESS THAN ONE HUNDRED DOLLARS : QUESTIONS NOT ARISING BELOW : PRESUMPTION.** In appeals involving less than one hundred dollars, the questions certified to this court will ordinarily be presumed to have been involved in the case ; but where it is claimed by the appellee, in his abstract, that such questions did not arise in the court below, then the record will be examined, and unless it appears therefrom that such questions did in fact arise, they will not be considered in this court. *Parker v. Michaels*, 209.
85. **ONLY QUESTIONS RAISED BELOW CONSIDERED.** In an action at law on a certificate of insurance on the assessment plan, the court's instructions, which were not excepted to, allowed a verdict not to exceed twenty-five hundred dollars, and a verdict for that amount was returned. No motion in arrest of judgment was made, and no claim presented that the verdict should have been for a merely nominal amount, nor that an action at law would not lie, nor that a judgment at law could not be rendered against the defendant, under the doctrine of *Newman v. Covenant Mut. Ben. Ass'n*, 72 Iowa, 242. Held that those claims could not now be urged in this court, and that the verdict could not be disturbed as being excessive. *Garretson v. Equitable Mut. Life & End. Ass'n*, 419.
86. **ERRORS ASSIGNED BUT NOT ARGUED.** Errors assigned but not argued will not be considered by this court. *Riordan v. Guggerty*, 688.
87. **NO BILL OF EXCEPTIONS.** When the evidence and rulings thereon have not been preserved by a bill of exceptions, this court cannot pass upon alleged errors in rulings on the admission of evidence, nor upon the propriety of the instructions given. *Acton v. Coffman*, 17.
88. **EXCLUSION OF EVIDENCE : NO EXCEPTION TAKEN.** Objections to the exclusion of evidence cannot be heard when made for the first time in this court. *McReynolds v. McReynolds*, 89.
89. **INSTRUCTIONS NOT EXCEPTED TO.** This court cannot review instructions to which the record does not show that exceptions were taken. *Paddleford v. Cook*, 433.
40. **CRIMINAL CASE : PRESUMPTION IN FAVOR OF JUDGMENT.** On the appeal of a criminal cause, where the evidence is not brought up, it will be presumed that every fact necessary to warrant the judgment was proved by competent and undisputed evidence. *State v. Blanchard*, 628.
41. **PRESUMPTION IN FAVOR OF VERDICT.** Where the trial court instructed the jury that they must find certain facts in order to find for the defendant, and there was evidence from which the jury might well have found such facts, and there was a general verdict for defendant, this court will presume that the jury found such facts, rather than that they disregarded the instructions of the court. *Helt v. Smith*, 667.

42. REVIEW OF FORMER OPINION : STARE DECISIS. The correctness of an opinion filed by this court may be reviewed upon a petition for rehearing, but not on a second appeal in the same case. *Windsor v. Cobb*, 709.
43. KIND OF PROCEEDINGS : INTERVENTION/IN ATTACHMENT. A proceeding by intervention in an attachment suit, under section 3016 of the Code, is not necessarily of an equitable nature, and cannot be so regarded on appeal when not so treated in the court below. *Clinton Nat. Bank v. Studemann*, 104.
44. ORDER SUBSEQUENT TO ONE APPEALED FROM. Where the order appealed from was one setting aside a judgment by default, *held* that this court could not consider a complaint made by appellant that appellee was permitted to file a demurrer to the petition after the judgment had been set aside, instead of an answer, as required by Code, section 2871. His remedy was to move to strike the demurrer from the files. *Jean v. Hennessy*, 348.
45. NEW PARTY AS APPELLEE'S ADMINISTRATOR. Although there is no showing anywhere in the record of this case that the appellee had died, or that Y. had been appointed as his administrator, the latter appeared, apparently without objection, as administrator, in the court below, and made a motion for the approval of the report of the referee, which was sustained. *Held* that, upon such a showing, he had no such interest in the cause as to entitle him to have stricken from the record in this court the evidence which the real parties in interest had agreed to be correct. but that his motion to strike should itself be stricken from the files upon the motion of appellants. *Maggarell v. Maggarell*, 378.
46. DUTY OF COUNSEL TO CITE DECISIONS. It is the duty of counsel practicing in this court to aid the court by citing former decisions of the court, bearing upon their cases, and not to defer such citation until a rehearing is asked. *State v. Farlee*, 451.
47. TRIAL DE NOVO : ACTION AT LAW INVOLVED IN EQUITABLE ACTION. Where an action was begun in equity to cancel a note and mortgage, but a third party intervened, claiming that the plaintiff owed the note and mortgage, and that it (the intervenor), and not the defendant, was entitled to the proceeds, and by stipulation it was agreed that plaintiff should pay a certain amount to the intervenor, and that it should pay the defendant whatever amount the court found due him, and the question thus arising between the defendant and intervenor was tried by the court without a jury, *held* that a trial *de novo* of that question could not be had in this court, though the cause was not transferred from the equity to the law side of the calendar. *McCormick v. Lundburg*, 558.
48. APPEAL : FROM NEGATORY ORDER : NO PREJUDICE. An order setting aside a former order, which has expired by its own terms, is of no effect, and hence no ground for complaint on appeal. *Blair v. Blair*, 311.
49. REVIEWING ALLOWANCE OF ATTORNEY FEE IN LIQUOR CASE. See *Intoxicating Liquors*, 31.

See APPEAL, 3, 4.

PRESCRIPTION.

See ADVERSE POSSESSION ; HIGHWAY, 2-4, 6.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETIES.

PRIORITY OF RIGHTS.

See CHATTEL MORTGAGE, 7; MECHANIC'S LIENS, 3; SALES, 1, 2.

PROMISSORY NOTES.

1. **PROVISION FOR ATTORNEY FEES: WHEN NOT COLLECTIBLE.** In an action for the cancellation of a note (which provided for attorney fees) and mortgage, the proceeds of which were claimed by both defendant and intervenor, it was agreed that plaintiff should pay the intervenor the amount due, and that the note and mortgage should be delivered up and cancelled; and this was done accordingly. It was also agreed that defendant should have judgment against intervenor for whatever share of the proceeds he should show himself entitled to. Judgment was afterwards rendered accordingly for a certain sum, but the court refused to allow defendant any attorney fees. *Held* correct, because the action between defendant and intervenor was not based on the note. *McCormick v. Lundburg*, 558.
2. **CONDITION INDORSED: CONSTRUED TO BE PENAL BOND: LIABILITY ON.** Defendant gave to plaintiff a writing which on its face was a promissory note, except that it referred to a "condition specified on back." On the back was written the following language: "This note is given on condition that the signer will cause trustees to assess damages on the eleventh of October, 1886, and costs, done by the hogs of the signer, and now in F. E. Ellett's possession, the award of said trustees to be subtracted from the amount of within note, and remainder of said note to be delivered to the signer on payment of trustees' award." *Held*—
 - (1) That the whole writing should be construed together, and that it was, in effect, a penal bond.
 - (2) That no recovery could be had by merely setting up the instrument and alleging breach thereof, but that it was necessary to allege actual damages, for which alone a recovery could be had.
 - (3) That such actual damages might be recovered upon a failure of the maker to procure an assessment of the damages, even though he made due diligence to have them assessed, but failed only because the trustees had refused to act. [REED, J., and SEEVERS, C. J., *dissenting*.] *Ellett v. Eberts*, 597.

PROXIMATE CAUSE.

See CITIES AND TOWNS, 7; RAILROADS, 43.

PUBLIC LANDS.

See BOUNDARIES, 1, 2; SCHOOL LANDS.

RAILROADS.

1. **AUTHORITY OF PRESIDENT.** The president of a railroad company has no power, by virtue of his office simply, to let a contract in behalf of the company for the construction of its road, when the same is already under contract made by its board of directors. (*Templin v. Chicago, B. & P. Ry. Co.*, 73 Iowa, 548, *followed*). *Griffith v. Chicago, B. & P. Ry. Co.*, 85.

2. **RAILROAD AID TAXES : COMMISSION TO TREASURER FOR COLLECTING.** There is no statute authorizing a county treasurer to withhold from the persons entitled to a railroad aid tax collected by him a commission of three per cent., or any commission, for the collection of the same. A commission for collection can be deducted only from the taxes collected by him for cities and towns. *Merrill v. Marshall County*, 24.
3. **ACTION TO RECOVER FROM COUNTY : DEFENSE : SALE OF ROAD.** In an action against a county to recover a portion of railroad aid taxes collected by the treasurer, which was retained by him and passed into the general county fund, the county cannot set up the fact that the companies for which the taxes were levied had sold and conveyed all their property and franchises before the taxes were due and collectible; although such defense might have been a good one for the taxpayers in resisting the payment of the tax. (Compare *Manning v. Mathews*, 66 Iowa, 675). *Id.*
4. ——— : ——— : **FORFEITURE BY DELAY IN COLLECTING.** Nor can the county defeat a recovery in such case on the ground that the taxes have been forfeited by being permitted to remain in the treasury more than two years (compare Laws of 1876, chap. 128, sec. 7), where it appears that the roads for which the taxes were voted were built, and the taxes, except the per cent. in controversy, were paid in installments to the persons entitled thereto, and that there was a continuing demand by them for the portion withheld. *Id.*
5. ——— : **JUDGMENT AGAINST COUNTY.** In such case, where the tax in dispute had been placed in the general county fund, and had been expended in paying the county's ordinary indebtedness, a judgment therefor was properly rendered against the county. (*Barnes v. Marshall County*, 56 Iowa, 20, distinguished). *Id.*
6. **RIGHT OF WAY : EVIDENCE AS TO DAMAGES.** In an action for damages to a farm, caused by taking the right of way for a railroad, witnesses were permitted to give their estimate of the value of the farm before the road was built, and then to state that it was worth a certain number of dollars less per acre after the road was built. *Held* not prejudicial error, since each of the witnesses afterwards stated that the farm was worth a certain sum per acre after the road was built. *Ball v. Keokuk & N. W. Ry. Co.*, 132.
7. ——— : **DAMAGES : COMPETENCY OF WITNESSES.** In such case the testimony of farmers, who lived in the neighborhood of the farm in question, and who stated that they knew the value of lands there, was competent on the question of damages. *Id.*
8. **RIGHT OF WAY : DAMAGES : SET-OFF : INSTRUCTIONS.** In an action against a railway company for right-of-way damages, it is proper for the court to instruct as to the constitutional provision that no benefits to the plaintiff are to be set off against his damages, even though no claim is made for such set-off on the trial. *Id.*
9. ——— : ——— : **ALLOWANCE NOT EXCESSIVE.** Considering the varying estimates of the witnesses, and other facts in the case (see opinion), a verdict of thirty-six hundred and forty-eight dollars for eleven acres of land taken for right of way for a railroad, cannot be regarded as so excessive as to justify interference by this court. *Id.*
10. **RIGHT OF WAY : DAMAGES : EVIDENCE.** In an action for the recovery of damages for right of way taken by a railroad company, all evidence is admissible which tends to show the jury the true condition of the land, and all its surroundings which affect the value and convenience of its use, and how such value and convenience are affected by the condemnation for right of way. (See opinion for illustrations). *Bell v. Chicago, B. & Q. Ry. Co.*, 843.

11. ——— : INSTRUCTION. In such case, where the court instructed the jury that they should not consider the amount allowed to plaintiff by the sheriff's jury, *naming the sum*, held that, if there was any error in naming the sum, it was one not prejudicial to defendant. *Id.*
12. ——— : EVIDENCE : RIGHT TO UNDER-CROSSING. In such case, the fact that plaintiff had always crossed from one part of his land to the other beneath defendant's trestle-work, tended to show a right so to cross, so that such right was properly recognized in instructions submitted to the jury. *Id.*
13. ——— : RIGHT TO CROSSING. In estimating the damages in such case, the right of the land-owner to a crossing from one part of his land to the other should be considered. *Id.*
14. RIGHT TO CROSS AT GRADE. The defendant was about to construct its road so as to cross plaintiff's track at grade. Plaintiff's track is level for three hundred feet east and nine hundred feet west of the proposed point of crossing. Just east of this level portion the track descends at the rate of thirty-seven feet per mile for one thousand feet, and just west of it there is an ascending grade varying from six to seventy feet per mile for seven thousand feet. On account of these grades, and the necessity of stopping all trains before crossing another track at grade (see Laws of 1884, chap. 163), the cost, danger and inconvenience of operating plaintiff's road would be much increased by the proposed crossing at grade. In view of these facts, and of the further fact that the cost of an under crossing would be only about fifteen thousand dollars more than the proposed grade crossing, held that defendant was not entitled, under section 1265 of the Code, to cross at grade, and that the construction of the proposed crossing was properly enjoined. *Humeston & S. Ry. Co. v. Chicago, St. P. & K. C. Ry. Co.*, 554.
15. CROSSING AT GRADE : INJUNCTION AFTER MONEY EXPENDED : REIMBURSEMENT. The question as to how defendant's road should cross that of plaintiff having been submitted to the railroad commissioners, they recommended an under crossing. Such a crossing would require considerable change in plaintiff's established track. Without asking leave to make these changes, and in disregard of the recommendation of the commissioners, defendant expended about six thousand dollars in the construction of a grade crossing, which is sought in this action to be enjoined. Held that the expenditure was a voluntary one on the part of defendant, and that plaintiff was under no obligation to reimburse it that amount in order to obtain from a court of equity the injunction which it sought, and which the court found it otherwise entitled to. *Id.*
16. OBSTRUCTING SURFACE WATER BY EMBANKMENT : LIABILITY. Where the defendant built an embankment across a wide creek bottom, and a culvert over the creek, thus causing all the surface water of the bottom to flow into the channel of the creek, but the culvert was not of sufficient capacity to carry the waters of the creek when thus augmented, and the result was that the land above the embankment was flooded, the land-owner may recover damages of the company. (See opinion for discussion of authorities *pro* and *con*). *Sullens v. Chicago, R. I. & P. Ry. Co.*, 659.
17. ——— : WHAT IS SURFACE WATER. In such case, water which left the creek channel far above the culvert, and flowed over plaintiff's land, but, on account of the embankment, was turned back into the channel again above the culvert, must be regarded, in determining the sufficiency of the culvert, as no longer surface water, but as though it had flowed all the time in the channel. *Id.*

18. **OBSTRUCTING WATER : DAMAGES.** In an action for damages caused by the obstruction of water by a railroad embankment, the court stated that the measure of plaintiff's damages for each year was the difference between the fair market value of the land immediately before the injury each year, and its fair market value immediately after such injury ; also that the term "land," so used, included the growing crops. *Held* to be in accord with the rule announced in *Drake v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa, 802, and correct. *Id.*
19. ——— : **STATUTE OF LIMITATIONS.** In such case, where the damage was likely to be of yearly occurrence, depending upon the seasons, and, on that account, could not be estimated when the obstruction was built, *held* that the plea of the statute of limitations, based on the fact that the action was not begun within five years after the obstruction was built, was properly taken from the jury. (See opinion for cases cited). *Id.*
20. **NEGLIGENCE : CROSSING HIGHWAY WITHOUT RINGING BELL.** Under chapter 104, Laws of 1884, to run a locomotive across a public highway without ringing the bell is negligence, for which the railroad company is liable. *Reed v. Chicago, St. P., M. & O. Ry. Co.*, 188.
21. ——— : ——— : **QUESTION FOR JURY.** Plaintiff was struck by a locomotive and injured, while driving across a railway track on a public highway. Upon the question whether the bell of the locomotive was rung or not, plaintiff testified positively that it was not ; that he looked and listened while approaching the track, and that the habits of his horses were such that they would not have gone upon the track had the bell been rung. Other witnesses who were in the vicinity, and some of whom heard the crash of the collision, and one of whom had his attention directed to plaintiff's danger, testified that they did not hear it. But the engineer and fireman, and another employe of defendant who was on the train, testified positively that it was rung. *Held* that there was such a conflict of the evidence as to preclude this court from interfering with the finding of the jury that the bell was not rung. *Id.*
22. **NEGLIGENCE : OBSTRUCTING STREET WITH CARS : INJURY TO TRAVELER ON CROSSING.** Plaintiff was struck by a locomotive and injured while driving across defendant's track on the street of a city. On a side-track, which crossed the street, a line of box-cars was stored, and had been for some days, so that they obstructed the street, except an opening of about thirty-five feet, which was left for public travel. *Held* that to so obstruct the street was negligence ; that if the whole width of the street was not required on which to drive vehicles, it was necessary that it should be left open, so that travelers approaching the crossing would have an unobstructed view of, at least, the full width of the street. *Id.*
23. **INJURY TO TRAVELER ON CROSSING : CONTRIBUTORY NEGLIGENCE : EVIDENCE.** The evidence in this case considered (see opinion), and *held* that it cannot be concluded therefrom, as matter of law, that plaintiff was guilty of contributory negligence in driving upon defendant's track as he did. *Id.*
24. ——— : **DUTY OF TRAVELER TO STOP VEHICLE.** It is not necessarily the duty of a traveler about to cross a railway track upon a highway to stop his team. He is only required to exercise such care and caution as a reasonable person of ordinary prudence and skill would exercise under the same or similar circumstances. *Id.*

25. ———: AMOUNT OF DAMAGES. The plaintiff in this case was a farmer sixty-five years old, and he was so injured through defendant's negligence that several of his ribs were broken in such a manner that they punctured his lung. Six months afterwards he could not raise his left arm above his head, and the injuries seem to be permanent in their nature. *Held* that a verdict of eighty-two hundred and fifty dollars could not be interfered with on appeal as being excessive. *Id.*
26. COLLISION AT STREET CROSSING: CONTRIBUTORY NEGLIGENCE: EVIDENCE. Plaintiff was struck by defendant's engine while driving a gentle horse over the track at a street crossing. For fifty feet before he reached the track defendant's engine, with headlight burning, could be seen by him for a distance of three hundred and fifty feet from the crossing. In view of this physical fact, *held* that his testimony that he looked and listened for an approaching train did not even create a conflict of evidence as to his contributory negligence; and since there was no evidence from which the jury could properly have found that the accident might have been avoided by the exercise of proper care after he discovered the danger, *held* that the verdict for plaintiff could not be sustained. *Bloomfield v. Burlington & W. Ry. Co.*, 607.
27. EJECTMENT OF PASSENGER: DAMAGES: EXEMPLARY WITHOUT ACTUAL. Plaintiff sued for damages to his health, through exposure, in being wrongfully ejected from defendant's train before he had reached the destination to which he had paid his fare. The court instructed the jury that he was not entitled to any damages, under the evidence, unless it was for the value of transportation from where he was ejected to his destination, and that, if they found him entitled to any damages on that ground, they might also give him exemplary damages in case they found that he had been ejected maliciously. But no damages for such transportation were claimed or proved by plaintiff, and it appeared that the fare to the two points was the same. *Held* that the instruction was erroneous in submitting a point that was not in issue, and that as, under the instruction, no other actual damages could lawfully be found, it was error to authorize the jury to find exemplary damages, since such damages can never be allowed in the absence of actual damages. (See cases cited in opinion). *Kuhn v. Chicago, M. & St. P. Ry. Co.*, 137.
28. INJURY TO PASSENGER ALIGHTING FROM MOVING TRAIN: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. It cannot be said, as matter of law, independently of the statute forbidding the act, that it would be, under all circumstances, an act of negligence for a passenger to attempt to alight from a moving train; but the question is ordinarily one of fact, to be determined by the jury from all the circumstances of the case. (See opinion for cases cited). *Raben v. Central Iowa Ry. Co.*, 732.
29. ———: WHETHER CRIMINAL ACT: PLEADING AND EVIDENCE. Section two, chapter 148, Laws of 1876, making it a misdemeanor to get off or on a moving railroad car, does not forbid the act when done with the consent of the conductor; and where plaintiff alleged that she was injured, without any negligence on her part, while alighting from defendant's moving car, *held* that the allegation of care on her part was sufficient to entitle her to prove that she so alighted with the conductor's consent, and that a motion in arrest of judgment, based on the insufficiency of the petition in that respect, was properly overruled. *Id.*

80. ———: ———: BURDEN OF PROOF. Plaintiff seeks to recover for an injury sustained by her while alighting, as a passenger, from defendant's moving train. *Held* that, if her act was a misdemeanor under section two, chapter 148, Laws 1876, she could not recover; and that, in order to recover, she had the burden to prove that she so alighted with the consent of the conductor, thus showing that her act was not forbidden by said section; but *held*, also, that such consent might be inferred by the jury from the conduct of the conductor at the time. But since there was no direct evidence of the conductor's consent, and the question whether such consent might be inferred from his conduct was not submitted to the jury, *held* that a verdict for the plaintiff could not be sustained. *Id.*
31. DUTY TOWARD PASSENGERS ALIGHTING FROM CARS. It is the duty of a railroad company to provide suitable and safe means for entering and alighting from its trains; but having done this, and having stopped its train in proper position and for a reasonable time to enable passengers to avail themselves of those means in entering and alighting, it is not bound to render them personal assistance, nor to hold the train until those in charge of it see that the passengers have in fact alighted. (*Allender v. Chicago, R. I. & P. Ry. Co.*, 37 Iowa, 268; s. c., 43 Iowa, 276, distinguished). *Id.*
32. INJURY TO BRAKEMAN: VIOLATION OF RULE: INSTRUCTIONS. In an action by a brakeman for injuries received while attempting to couple cars on defendant's road, the court rightly instructed the jury that a certain rule of the company in relation to the care to be exercised in coupling cars was a proper one (see opinion for rule), and that obedience thereto was incumbent on plaintiff; but in another instruction the jury were advised, in substance, that plaintiff might recover, even though he violated the rule, if he was not guilty of negligence in any other respect. *Held* that the last instruction was erroneous, because it substituted the judgment and discretion of the plaintiff in place of the rule. *Deeds v. Chicago, R. I. & P. Ry. Co.*, 154.
33. DEATH OF BRAKEMAN: RISKS ASSUMED: HIGH SPEED. In an action for the death of a brakeman, where there was evidence tending to establish the claim that, owing to the condition of the track, the defendant was negligent in running its train at so great speed, *held* that it was error to give an instruction which expressed the doctrine that the decedent assumed the risk of the dangers incident to the speed at which the train was run; the dangers assumed by decedent being such only as were incident to the operation of the road in a reasonably prudent and careful manner. *Connors v. Burlington, C. R. & N. Ry. Co.*, 383.
34. INJURY TO SECTION-HAND WHILE BOARDING MOVING CARS: NEGLIGENCE: QUESTION FOR JURY. Plaintiff and others were section-hands of defendant, engaged in removing snow and ice from the track. While so engaged, a train of cars loaded with slack came along, moving slowly, and the conductor and others in charge of the train directed them to get upon the train to unload the slack. They requested that the train be stopped, but were told that, if stopped, it could not be started again. In attempting to obey the order, plaintiff was thrown down by a jerk of the train and injured. *Held* that the question of negligence on the part of both plaintiff and defendant was one for the jury to determine from the evidence, of the weight of which they were the sole judges. *Rayburn v. Central Iowa Ry. Co.*, 637.

35. ——— : ——— : **MATTER OF LAW.** In such case, *held* that if it would, under other circumstances, have been negligence for defendant to attempt to board the moving train, it was not negligence for him to do so when directed by the conductor and others having charge of the train. (Compare cases cited in opinion). *Id.*
36. ——— : **ACTION UNDER CODE, SECTION 1307 : USE AND OPERATION OF RAILROAD.** In such case, *held* that plaintiff was not precluded from bringing his action against the company under section 1307 of the Code, on the ground that the negligence complained of was in no manner connected with the use and operation of the railroad. (See cases cited in opinion). *Id.*
37. ——— : ——— : **CONSTITUTIONALITY.** Section 1307 of the Code, authorizing actions against railroad companies by employes for injuries caused by the negligence of co-employes, is not in conflict with the fourteenth amendment to the constitution of the United States. (*Bucklew v. Central Iowa Ry. Co.*, 64 Iowa, 603, *followed*). *Id.*
38. ——— : **EXCESSIVE VERDICT.** A verdict of thirty-five hundred dollars cannot be said by this court to be excessive for an injury to the knee of a section-hand, who is also a mechanic, where the jury may well have found the injury to be permanent. *Id.*
39. ——— : **NEGLIGENCE IN CARE OF WOUND.** Whether the continuance of plaintiff's disability was attributable to his subsequent want of care was a question for the jury, with whose finding this court sees no reason to interfere. *Id.*
40. ——— : **DAMAGES : ABILITY TO EARN MONEY.** In an action against a railroad company for a permanent injury to a section-hand, it was proper to allow him to show that he was a mechanic, and, as such, capable of earning more money than was paid him by defendant for his services. *Id.*
41. **STOCK KILLED ON TRACK : NEGLIGENCE AS TO CLOSING GATE : QUESTIONS FOR JURY.** In an action against defendant for the value of colts which went upon its track through an open gate in its fence, and were killed, *held* that the questions—what constituted the proper exercise of care in the case, and whether a failure to inspect the gate for three or four days, or for a longer or shorter time, was negligence, or whether the gate's being open for thirty-six hours would raise a presumption of negligence against the defendant, and charge it with knowledge that the gate was open, were properly submitted to the jury. (Compare *Perry v. Dubuque S. W. Ry. Co.*, 36 Iowa, 102; *Bell v. Chicago, B. & Q. Ry. Co.*, 64 Iowa, 321). *Wait v. Burlington, C. R. & N. Ry. Co.*, 207.
42. ——— : **DUTY TO CLOSE GATE.** In such case, *held* that it was defendant's duty to close the gate after obtaining knowledge that it was open, whether it was left open by its employes or others. (See cases cited). *Id.*
43. **INJURY TO STOCK FROM WANT OF FENCE : LIABILITY.** Under the statute (Code, sec. 1289), a railroad company is liable for injury to stock on its right of way from the want of a fence, only when such want, in connection with some act of the company, is the proximate cause of the injury (compare *Young v. St. Louis, K. C. & N. Ry. Co.*, 44 Iowa, 172) ; and in this case no such act is shown. *Asbach v. Chicago, B. & Q. Ry. Co.*, 248.
44. ——— : **NEGLIGENCE NOT INVOLVED.** In an action for injury to stock, where the petition set up merely that the injury was caused by the want of a fence, *held* that plaintiff was not entitled to have the question of general negligence adjudicated. *Id.*

45. INJURY TO CATTLE ON TRACK : RECOVERY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE. A person who drives his cattle over a railroad crossing without looking or listening for a train is guilty of negligence ; but where the cattle are killed by a train, and it is shown that the company's employes, by the use of ordinary care and prudence, could have avoided the injury after discovering the danger, a recovery cannot be defeated on account of the owner's contributory negligence. (See *Morris v. Chicago, B. & Q. Ry. Co.*, 45 Iowa, 29). *Wooster v. Chicago, M. & St. P. Ry. Co.*, 593.
46. DUTY TO REPAIR APPROACHES TO TRACK ON CITY STREETS. See Cities and Towns, 8.
47. STREET RAILWAYS : REGULATION OF : VESTED RIGHTS. See Cities and Towns, 16.
48. LOCATION OF : CONTROL BY PRIVATE CITIZENS. See Mandamus, 1.

See NUISANCE, 4 ; TAXATION, 4.

REAL ESTATE.

ACTION TO RECOVER : MINOR'S LAND SOLD BY FATHER : RATIFICATION : EVIDENCE : TAXES PAID BY PURCHASER. A father purchased a section of land with his wife's money, and had a quarter-section of it conveyed to each of their four minor sons, who are plaintiffs herein. Afterwards, and while plaintiffs were yet minors, he conveyed the land to defendants in exchange for other land, a portion of which was conveyed to one C., who afterwards, for a named consideration, conveyed it to plaintiffs. Plaintiffs and defendants entered into possession of the lands which came to them respectively under these transactions, and defendants paid taxes on the lands which they thus claimed to own. This action was to recover the land conveyed by the father to defendants. *Held*—

- (1) That if C. was a mere conduit for passing the title from defendants to plaintiffs of the land which C. conveyed to them, and plaintiffs accepted and disposed of this land, knowing that it was the consideration which defendants had paid for the land in question, this would be a ratification of their father's act in making the exchange, and that they could not recover ; but
- (2) That, in order to defeat plaintiffs' recovery on their legal title, it was necessary for defendants to prove these facts by clear and satisfactory evidence, which they have failed to do.
- (3) That, since defendants paid taxes on the land in good faith, believing that they were the real owners, they were entitled, upon a decree being entered for plaintiffs for the lands, to a judgment for such taxes with interest, the same to be a lien on the land. *Leathers v. Ross*, 630.

See ADVERSE POSSESSION ; BOUNDARIES ; OCCUPYING CLAIMANT ; SALES, 8 ; SCHOOL LANDS, 1 ; TAXATION, 1 ; TAX SALE AND DEED ; TRUSTS, 1-3 ; VENDOR AND VENDEE.

REASONABLE DOUBT.

See CRIMINAL LAW, 9.

REDEMPTION.

1. BY FRAUDULENT GRANTEE FROM GRANTOR'S DEBT : TIME. See Fraudulent Conveyance, 1.
2. FROM TAX SALE BY ACTION IN EQUITY. See Tax Sale and Deed, 11, 12.

REPLEVIN.

1. **PLEADING : SPECIAL INTEREST : MONEY JUDGMENT.** Action to recover certain property, or a judgment for its value. Plaintiff alleged that he, as agent of another, had a special property in certain described books of the aggregate value of two hundred and fifty-nine-dollars. *Held* that this was a sufficient statement of the value of his special property to entitle him to a money judgment in case the books could not be found, because his interest was equal to the value of the books. *Morris v. Burley*, 45.
2. **SPECIAL PROPERTY : FORM OF VERDICT.** The court instructed the jury, if they found for plaintiff, to state in the verdict that he was entitled to the possession of the goods as agent, and the value of his interest therein. The verdict was for plaintiff, without saying "as agent." *Held* that there was no prejudicial error in rendering judgment upon the verdict in favor of plaintiff for the value of his interest as found. *Id.*
3. **JUDGMENT FOR PROPERTY.** Where there is judgment for defendant in a replevin suit, he is not entitled to judgment for the property or its value where it appears that it was never delivered to plaintiff. *Clapp v. Trowbridge*, 550.

RES ADJUDICATA.

See FORMER ADJUDICATION.

RES GESTAE.

See CRIMINAL LAW, 12.

SALES.

1. **DELIVERY : SUBSEQUENT LEVY WITH NOTICE.** Defendant sold and delivered the cattle in question to intervenor, who at once delivered them back to defendant, to be cared for until the following Monday, and then driven to B., which services defendant was to perform for intervenor as part of the contract of sale. *Held* that this sale was valid as against defendant's creditors, on whose behalf the sheriff, with notice of the facts, levied on the cattle as the property of defendant, while they were yet in his possession. *Clinton Nat. Bank v. Studemann*, 104.
2. **CONDITION : RESALE WITHOUT NOTICE : SUBSEQUENT MORTGAGE.** A lessee of coal land purchased scales for weighing coal, and charged them to the lessors, against their account for royalty, as agreed in the lease. The scales were purchased upon an order which provided that the vendor should not relinquish title until they were fully paid for, but the lessors had no actual or constructive notice of such condition. *Held* that the charging of the scales to the lessors by the lessee, under the agreement between them, was a sale of the scales to the lessors, and that they took them free from any lien which the vendor of the scales might have had as against the lessee, and free, also, from a mortgage for the purchase money subsequently made to the vendor by an assignee of the lessee; and that it made no difference on which side the balance of the account stood as between the lessors and the lessee. *Thatcher v. Union Scale Co.*, 117.
3. **PRICE TO BE PAID : CONSTRUCTION OF CONTRACT.** Defendants, having bought a stock of goods at sixty-five per cent. of their invoiced price, sold a portion of them to plaintiffs, under an agreement that they should be invoiced to plaintiffs "at the invoiced price that first parties (defendants) purchased same for." *Held* that this meant the price which defendants paid for the goods, and not the invoiced price of which they paid only sixty-five per cent. *Salm v. Israel Bros.*, 314.

4. **FALSE REPRESENTATIONS : REMEDY.** Defendants, having agreed to sell a stock of goods at cost to defendants, and to take city lots in exchange, fraudulently invoiced the goods to plaintiffs much in excess of their cost, and took conveyances of enough of lots at agreed prices to cover the aggregate value of the goods estimated upon the false invoice. *Held* that plaintiffs were entitled to a recovery for the difference between the real cost and that shown by the false invoice, and were not limited to an action to recover enough of the real estate to equal that difference. *Id.*
5. **WARRANTY : INSTRUCTIONS.** An objection to instructions as to what would constitute a warranty, on the ground that they took from the jury statements made by the vendor during the negotiations, but four or five weeks before the sale, *held*, upon examination, to be without foundation. *Bothwell v. Farwell*, 824.
6. **OF BUCKS : WARRANTY AS TO HEALTH : SUBSEQUENT DISEASE.** A warranty upon the sale of bucks that they were all sound and in a healthy condition, and that each one would serve twenty-five ewes, *held* to refer solely to their condition at time of sale, and not to be a guaranty against future disease rendering them unable to serve twenty-five ewes each. *Id.*
7. **OF MACHINE : ACTION ON PURCHASE NOTE : WARRANTY : FAILURE OF CONSIDERATION : EVIDENCE.** In an action upon a promissory note given for the purchase price of a machine, where the defense was failure of consideration and breach of written warranty, defendant was permitted, without objection, to testify to the contents of the alleged written warranty, without laying a foundation for the introduction of such secondary evidence, and plaintiff did not afterwards move to exclude this testimony. *Held* that it could not afterwards object to the testimony of the defendant and others as to the worthlessness of the machine on the ground that no warranty had been proved; and that, at all events, such testimony was admissible on the issue of failure of consideration. *Aultman & Taylor Co. v. Trainer*, 417.
8. **OF LAND : BREACH OF ORAL WARRANTY : PLEADINGS AND PROOF.** In an action for the breach of an oral warranty in the sale of land, where the petition alleges that the warranty was a part of the contract of sale, and a part of the consideration of the purchase price, plaintiff may recover upon proving the warranty and a breach of it, without showing that he relied on it; for in such case the law will presume that he relied upon it. *Norris v. Kipp*, 444.
9. **OF GRAIN FOR FUTURE DELIVERY.** See Contract, 3.
10. **BILL OF SALE : DELIVERY.** See Contract, 4.

SCHOOL LANDS.

FORECLOSURE OF SALE CONTRACT : PURCHASE BY SURETY : EFFECT OF PRIOR TAX SALE. The surety of a purchaser of school land upon credit may purchase the land at judicial sale upon the foreclosure of the contract of purchase, even though the judgment on which it is sold is against him as well as his principal; and his title will be free from any encumbrance on account of a prior sale of the land for taxes, under chapter 101, Laws of 1876. *La Rue v. King*, 288.

SELF-DEFENSE.

See CRIMINAL LAW, 33, 52-54; HIGHWAY, 1.

SETTLEMENT.

See CONTRACTS, 2; EVIDENCE, 6; MISTAKE, 2.

INDEX.

SEWERS.

See CITIES AND TOWNS, 9-14.

SIDEWALKS.

See CITIES AND TOWNS, 1-6; MECHANIC'S LIENS, 1

SLANDER AND LIBEL.

1. **SLANDER : CHARACTER OF PLAINTIFF : CROSS-EXAMINATION.** In an action for slander, where none of plaintiff's witnesses had testified on direct examination as to her character, or as to rumors and reports in regard to her, *held* that it was incompetent on cross-examination to inquire as to rumors affecting her character, even though her bad reputation was pleaded in mitigation of damages. (See Code, sec. 2682). *Hanners v. McClelland*, 318.
2. ——— : **EVIDENCE : OTHER SIMILAR STATEMENTS.** In an action for slander, statements of the character of those complained of, and made by defendant at about the same time, may be shown in evidence against him. *Id.*
3. ——— : **GENERAL REPUTATION OF PLAINTIFF : EVIDENCE OF SPECIFIC ACTS AND RUMORS THEREOF.** In an action for slander, defendant pleaded in mitigation of damages that plaintiff was a woman of bad reputation for chastity ; and that at a certain time it was a matter of general rumor that she and her employer held sexual intercourse. *Held* that special acts of sexual intercourse between her and her employer could not be proved, because not pleaded, and that still less could rumors of such special acts be proved ; but that defendant was confined to proof of her general reputation for chastity. *Id.*
4. ——— : **REPUTATION FOR CHASTITY : NEIGHBORHOOD.** In an action for slander, defendant pleaded that plaintiff was a woman of bad reputation for chastity in the neighborhood of a certain summer resort, and his evidence related only to her reputation in that neighborhood. But, it appearing that she was at the resort only a few weeks, and resided in a neighboring town both before and after her residence there, *held* that evidence of her good reputation was properly admitted on her behalf. *Id.*
5. ——— : **REPETITION : PLEADING AND PROOF.** It is competent, in actions for slander, to prove a repetition of the slanderous charges for the purpose of showing malice (see cases cited in opinion), but such repetition should not be pleaded, and, when pleaded, may properly be stricken out on motion. *Halley v. Gregg*, 563.
6. ——— : **WHEN ACTIONABLE : CHARGE OF LETTING HOUSE FOR LEWD PURPOSES.** To let a house to fallen women for lewd purposes for one night is a statutory crime (Code, sec. 4015), and to charge one falsely with such crime is actionable *per se*, without pleading special damages. *Id.*
7. **LIBEL : CHARGING CRIME : PLEADING SPECIAL DAMAGES.** To constitute libel, it is not necessary that the publication should charge the commission of a statutory crime. (See Code, sec. 4097). And where the charge constitutes libel, as defined by said section, it is actionable *per se*, and special damages need not be alleged. (See *Call v. Larabee*, 60 Iowa, 212). *Id.*

SPECIFIC PERFORMANCE.

See CONTRACT, 1.

STARE DECISIS.

See PRACTICE IN SUPREME COURT, 42.

STATUTES CITED, CONSTRUED, ETC.

[The words in Roman type indicate the subject under consideration, and the figures following refer to the page in this volume where the statute is cited.]

REVISION OF 1843.

Page 670. sec. 19. Will: Validity: Disinheriting heir. 282.

CODE OF 1851.

Sec. 1277. Power to dispose of property by will: Disinheriting heir. 282.

LAWS OF 1853.

Chap. 61. Widow's dower: Life estate. 861.

LAWS OF 1855.

Chap. 45. Liquor nuisances. 612.

REVISION OF 1860.

Sec. 2309. Power to dispose of property by will: Disinheriting heir. 282.

LAWS OF 1862.

Chap. 47, sec. 3. Liability of saloon property: Consent of owner. 167.

LAWS OF 1872.

Chap. 26. Assessment of railroad property. 286.

CODE OF 1873.

Sec. 85. Marginal notes in Code: Effect of. 749.
 Sec. 45, Par. 1. Vested rights: Permit to sell liquors. 272.
 Sec. 200. Filing papers: What sufficient. 724.
 Sec. 213. Attorney at law: Agreement by: Evidence. 269, 339.
 Secs. 478, 479. Cities and towns: Collection of special taxes. 67, 70, 680.
 Secs. 479, 481. Collection of special city taxes. 680.
 Secs. 801, 802. Taxation of moneys and credits. 180.
 Sec. 803. Taxation: Trust property. 182.
 Sec. 808. Assessment of railroad bridges over Miss. and Mo. rivers. 286, 287.
 Sec. 812. Assessment of real estate. 96.
 Secs. 813, 821. Taxation of corporation stocks. 182.
 Sec. 814. Taxation: Deduction from moneys and credits. 180.
 Sec. 821. County supervisors: Classifying property for assessment. 285.
 Sec. 823. Taxation: Property subject to. 180.
 Sec. 825. Duty of assessor. 97.
 Secs. 829, 830, 832, 834. Boards of equalization of taxes: Duties. 96, 97.
 Secs. 829, 830. Excessive taxation: Remedy. 284.
 Sec. 831. Tax assessment: Appeal. 124.
 Sec. 832. County supervisors: Duty in equalizing assessments. 285, 717.
 Sec. 836. County auditor: Duty in equalizing assessments. 97.
 Sec. 845. Carrying forward delinquent taxes. 109.
 Sec. 870. Duty to refund tax erroneously exacted. 717.
 Sec. 876. Tax sale: Amount bid. 222.

Secs. 892, 893. Tax deed: Action to redeem: Equities adjusted. 490.
 Sec. 1160. Corporations: Purpose of 41.
 Sec. 1257. Right of way damages: Form of judgment. 136.
 Sec. 1265. Railroads: Construction over other tracks. 555, 556.
 Sec. 1289. Railroads: Failure to fence: Liability. 250.
 Sec. 1307. Railroads: Personal injury: Liability: Constitutionality. 640.
 Secs. 1317, 1322. Assessment of railroad property. 286.
 Sec. 1332. Bastard child: Duty of father to support. 576.
 Secs. 1361, 1365. Paupers: Relief by township trustees: Discontinuance by supervisors. 496, *et seq.*
 Secs. 1452, 1454, 1455. Trespassing animals: Assessment of damages. 601.
 Secs. 1523, 1539, 1540, 1554. Giving away intoxicating liquors: Criminality. 21.
 Secs. 1537, 1538. Reports of liquors sold: Mistake: Liability. 267.
 Sec. 1540. Liquor prosecutions: Several counts in information. 293.
 Secs. 1543, 1544. Liquor nuisance: Pharmacists. 121.
 Sec. 1558. Liability of property used for sale of liquors: Consent of owner. 165, 168, 169, 236.
 Secs. 1838, 1841. Fines and forfeitures: Disposition of. 339.
 Secs. 2014, 2015. Terminating tenancy at will. 637.
 Sec. 2031. Easement: Adverse possession: Evidence of use. 408.
 Sec. 2120. Assignment for creditors: Report of assignee: Judicial notice of contents. 405, 406.
 Sec. 2126. Assignment for creditors: Claim filed too late. 406.
 Sec. 2229. Divorce: Points covered by decree. 632.
 Sec. 2236. Marriage: Insane husband: Dissolution: Compensation. 303.
 Sec. 2322. Power to dispose of property by will: Disinheriting heir. 282.
 Sec. 2340. Will: Probate: Contest: Jury trial. 463.
 Sec. 2353. Wills: Probate: Conclusiveness. 463.
 Sec. 2466. Bastard child: Recognition by father: Effect. 576.
 Sec. 2505. Civil action: Based on private interest. 701.
 Sec. 2590. Change of venue: County a party. 338.
 Sec. 2600. Petition filed too late: Dismissal. 434.
 Sec. 2682. Personal injury: Evidence: Mitigating circumstances. 176, 320, 322.
 Sec. 2683. Intervention: Basis of right. 700.
 Sec. 2686. Immaterial variance: Practice. 643.
 Sec. 2689. Amendment of assignment of errors. 38.
 Sec. 2717. Matters to be specially pleaded: Liquor nuisance. 539.
 Sec. 2741. Appeal: What evidence to be certified. 270.

- Sec. 2742. Appeal: Certificate to evidence by trial judge's successor. 711.
- Sec. 2781. Default: setting aside: Pleading forthwith. 851.
- Sec. 2788. Stating issues to jury. 366.
- Sec. 2789. Exceptions to instructions: Definiteness. 447.
- Sec. 2808. Right of jury to return special verdict. 368.
- Sec. 2831. Bill of exceptions: Time of filing. 269.
- Secs. 2831, 2835. Bill of exceptions: By whom signed. 745.
- Sec. 2837. New trial: Accident or surprise. 229.
- Sec. 2933. Will: Contest: Costs. 359.
- Sec. 2949. Fraudulent conveyance: Trust in grantee. 536.
- Sec. 3016. Attachment: Intervention. 107.
- Sec. 3102. Redemption from execution sale. 81.
- Secs. 3135, 3153. Proceedings in aid of executions. 620 *et seq.*
- Sec. 3154. Judgment: Vacation: Casualty. 567.
- Sec. 3173. Appeal: Less than \$100 by *remittitur*. 218; Requisites of judge's certificate. 544.
- Secs. 3178, 3179. Appeal: Jurisdiction: Notice requisite. 577.
- Sec. 3181. Appeal: Abstract filed too late: Effect. 646.
- Sec. 3183. Assignment of errors: Amendment: Time of filing. 37, 38.
- Sec. 3184. Appeal: What to be put in record. 269.
- Sec. 3207. Assignments of error: Exactness required. 549.
- Sec. 3331. Nuisance: Damages: Order of abatement. 132.
- Secs. 3375, 3381. Amendment: Mandamus in aid of main action. 44.
- Sec. 3377. Mandamus: Enforcement of public duty. 384.
- Sec. 3543. Justice's court: Setting aside default and judgment. 88, 232.
- Sec. 3550. Justice of peace: Setting aside verdict. 232.
- Sec. 3639. Evidence: Personal transaction with one deceased. 623, 686.
- Sec. 3648. Witness: Inquiry as to conviction for crime. 322.
- Sec. 3655. Evidence: Signatures: Experts. 691.
- Sec. 3777. Short-hand reporter's notes: Part of record. 724; Reference to in bill of exceptions. 725.
- Sec. 3790. Criminal appeal: costs: Liability of county. 541.
- Sec. 3793. County treasurer: Commission on taxes collected. 26, 27.
- Sec. 3829. Attorney's fee: Prosecution of liquor cases. 293.
- Sec. 3840. Murder: Definition. 530.
- Sec. 3841. Criminal appeal: Costs: Liability of county. 541.
- Sec. 3872. Assault with intent to murder: Indictment. 531.
- Sec. 3909. Embezzlement: Indictment. 604.
- Sec. 3917. Forgery defined. 616.
- Sec. 4012. Joint indictment: Separate trials: Discretion of court. 506.
- Sec. 4018. Keeping lewd house. 706.
- Sec. 4015. Letting house for lewd purposes. 565.
- Sec. 4073. Obtaining signature falsely. 615.
- Sec. 4074. Fraudulent conveyance Criminality. 455.
- Sec. 4097. Libel: Definition. 566.
- Sec. 4293. Witness not named on indictment. 201.
- Sec. 4296, par. 2. Indictment: Requisites. 604.
- Sec. 4298. Indictment: Charging offense. 238.
- Secs. 4298, 4305. Indictment: Certainty as to offense charged. 502.
- Secs. 4301, 4305. Indictment: Charge as to time. 503.
- Secs. 4337, 4341. Indictment: Quashing for want of evidence. 584.
- Secs. 4349, 4350. Plea of not guilty: Jury trial. 145.
- Sec. 4350. Criminal law: Necessity of jury on indictment. 441.
- Sec. 4381. Criminal appeal: Costs: Liability of county. 541.
- Sec. 4421. Witness not named on indictment: Notice. 201, 624.
- Sec. 4424. Joint indictment. Separate trials: Discretion of court. 506.
- Sec. 4434. Criminal practice: Keeping jury together. 201.
- Sec. 4440. Manner of stating issues to jury. 411.
- Secs. 4465, 4466. Criminal law: Included offenses: Duty of jury. 533.
- Secs. 4487, 4488. New trial: What is: Effect of. 144.
- Sec. 4489, par. 6. Criminal law: New trial: Verdict against evidence. 534.
- Sec. 4533. Criminal procedure: Errors without prejudice. 203; Duty of appellate court. 697.
- Secs. 4574, 4585. Form and effect of bail bond. 340.
- Secs. 4669, 4672. Criminal law: Appeal from justice's court: Waiver of jury in appellate court. 442.
- Sec. 4702. Criminal law: Appeal from justice's court: Trial *de novo*. 442.
- Sec. 4723. Bastardy: Judgment: Power to vacate. 576.

LAWS OF 1874.

- Chap. 56. Appeal: Delay in filing abstract: Effect. 646.

LAWS OF 1876.

- Chap. 11. Wills: Contest: Jury trial. 463.
- Chap. 54. Sewers: Construction: Taxes. 68, 69.
- Chap. 79. Sale of land for part of taxes due. 222.
- Chap. 100, sec. 6 (Miller's Code, sec. 2183). Mechanic's lien: Description. 52.
- Chap. 100, sec. 9 (Miller's Code, sec. 2135). Mechanic's lien: Innocent purchaser. 53.
- Chap. 116, sec. 3. Sewer tax: Collection of. 69.
- Chap. 123. Collection of railroad aid taxes: Treasurer's commission: Forfeiture by delay. 26, 27.
- Chap. 143, sec. 6. Jurisdiction of superior court. 370.
- Chap. 143, sec. 7. Superior court: Criminal cases: Appeal. 370, 371.
- Chap. 143, sec. 16. Superior court: Jury trial: Number of jurors. 384.
- Chap. 148. Boarding moving cars: Misdemeanor. 735.

LAWS OF 1880.

- Chap. 75. Sale of liquor by pharmacist not registered. 274.
Chap. 77, sec. 1. Prosecution under ordinance: Jury trial. 870, 871.
Chap. 211. Insurance: Indorsement of application on policy: Interpretation. 747.

LAWS OF 1882.

- Chap. 24, sec. 4. Superior court: Appeal in criminal case. 870.
Chap. 24, sec. 6. Superior court: Jury of six: Constitutionality. 384.

LAWS OF 1884.

- Chap. 143. Liquor nuisances. 612; Parties plaintiff: Intervention. 700.
Chap. 168. Railroad crossings: Stopping trains. 555.

LAWS OF 1886.

- Chap. 66, sec. 1. Liquor nuisance: Who may prosecute. 486; Punishments. 612; Intervention as plaintiff. 700.

- Chap. 66, sec. 8. Liquor injunction: Punishment for contempt in vacation: Constitutionality. 168.
Chap. 66, sec. 12. Liability of saloon property: Consent of owner. 165, 168, 169, 236.
Chap. 88. Pharmacist: Permit to sell liquors: Vested right. 272 *et seq.*; Report of sales to auditor. 582.
Chap. 87. Road supervisors: Interfering with access to property. 493.
Chap. 134. Abolition of circuit court. 350.

CONSTITUTION OF IOWA.

- Art. 1, sec. 9. Right to jury trial. 385.
Art. 1, sec. 10. Right of accused to jury trial. 370.
Art. 1, sec. 21. *Ex post facto* laws. 504.

CONSTITUTION OF UNITED STATES.

- Art. 1, sec. 10. *Ex post facto* laws. 504.
Fourteenth Amendment: Sec. 1307, Code, not in violation of. 641.

STATUTE OF FRAUDS.

PROMISE TO PAY ANOTHER'S DEBT: CONSIDERATION. Plaintiff had attached certain property of H. Afterwards H. was offering other property, on a part of which defendant had a mortgage, for sale at auction, and defendant was to have enough of the proceeds of the sale to satisfy his mortgage. At this time plaintiff was about to attach more of the property, and the sale was about to stop. Defendant thereupon orally agreed with plaintiff, that if he would desist from attaching more property, and thus allow the sale to proceed, he would pay so much of plaintiff's claim against H. as should not be paid by the sale of property already attached. *Held* that the promise was based upon a sufficient consideration to take it out of the statute of frauds. (See opinion for cases followed and distinguished). *Helt v. Smith*, 667.

See GARNISHMENT, 1.

STATUTE OF LIMITATIONS.

See ADVERSE POSSESSION; RAILROADS, 19; TAX SALE AND DEED, 6, 7.

STREETS.

See CITIES AND TOWNS, 2, 7, 8.

STREET RAILWAYS.

See CITIES AND TOWNS, 16.

SUPERIOR COURT.

NUMBER OF JURORS. See Criminal Law, 3; Jury Trial, 1.

SUPREME COURT.

JURISDICTION OF. See Appeal, 8-9.

See PRACTICE IN SUPREME COURT.

SURETIES.

1. ON APPEARANCE BOND : DISCHARGE : DELAY IN ARRESTING THE ACCUSED. Sureties on an appearance bond are not discharged by the failure of the sheriff to arrest the accused, by service of a warrant placed in his hands for that purpose, immediately upon his conviction and sentence to pay a fine ; even though the delay of the sheriff is in obedience to instructions from the district attorney, given for the purpose of enabling the accused to make some arrangements with the board of supervisors for the payment of the fine ; for such board has no authority to enter into any arrangements in reference thereto. *State v. Stewart*, 336.
2. ——— : ——— : NEGLECT TO ARREST ACCUSED AFTER CONVICTION. Where the accused is on bail, and is present at the term of his trial and conviction, and remains until the adjournment of court, and is not arrested or called on to surrender himself during the term, this will not exonerate his bail. (Compare *State v. Craner*, 50 Iowa, 582 ; *State v. Brown*, 16 Iowa, 316). *Id.*
3. ON OFFICIAL BOND : LIABILITY. See Constable, 1.

See SCHOOL LANDS, 1.

TAXATION.

1. TOWNSHIP BOARD OF EQUALIZATION : INCREASING ASSESSMENT OF LAND IN EVEN-NUMBERED YEARS. From a comparison of various sections of the Code cited in the opinion, it is *held* that the board of equalization of a township, town or city has no authority, in the even-numbered years, to add to or change the assessed value of real estate as established in the next preceding odd-numbered years, in which alone such property is assessable ; and where such change was attempted, the collection of the additional taxes arising from an increase of the assessed value was properly enjoined. [BECK, J., dissenting]. *Goold v. Lyon County*, 95.
2. APPEAL FROM BOARD OF EQUALIZATION : EVIDENCE. On an appeal from an order of the board of equalization increasing the assessment of a taxpayer, the appellate court tries the case anew upon the evidence introduced in that court, and not alone upon the record of the board of equalization ; the object of an appeal, according to the true meaning of the word, being to secure a new trial upon the merits. *Grimes v. City of Burlington*, 123.
3. EXCESSIVE ASSESSMENT : REMEDY : FAILURE OF SUPERVISORS TO CLASSIFY PROPERTY. For an excessive assessment of property for taxation, the taxpayer's remedy is with the township board of equalization, and by appeal from the action of such board to the district court, if not satisfied with its action. (Code, secs. 829-831). The board of supervisors has no power to afford him relief. (See opinion for authorities cited). And the fact that the board of supervisors has not classified the property in question, as it has power to do under Code, section 821, makes no difference. *Mo. Valley & B. Ry. & B. Co. v. Harrison County*, 283.
4. RAILROAD BRIDGES : BY WHOM ASSESSED : STATUTES CONSTRUED : CONSTITUTIONALITY. Under sections 808 and 1819 of the Code, all railroad bridges are to be assessed for taxation by the executive council, except those over the Mississippi and Missouri rivers, and they are to be assessed by the assessors of the local districts in which they are situated ; and such construction does not render section 808 unconstitutional. *Id.*

5. **JURISDICTION OF ASSESSOR.** An assessor in this state has the power and jurisdiction to determine that shares of stock in a bank in another state, owned by residents in his district, are assessable by him, so that the assessment, if erroneous, will not be void. *Van Wagenen v. Supervisors Lyon County*, 716.
6. **ERRONEOUS ASSESSMENT: UNWARRANTED CORRECTION BY SUPERVISORS: CERTIORARI BY TAXPAYER.** Where a taxpayer was assessed at the place of his residence with shares in a bank located in another state, and, without complaining to the city or township board of equalization, he applied to the county supervisors for an abatement of the tax, and they granted the relief asked, *held* that they acted without jurisdiction, and that a taxpayer of the county was entitled to have their action reviewed and set aside on *certiorari*. (See statutes and cases cited in opinion). *Id.*
7. **FOR SPECIAL PURPOSES IN CITY: REGULARITY: VALIDITY: NOTICE: LIMIT: COLLECTION: METHOD.** See Cities and Towns, 9-15.
8. **OF MONEY AND CREDITS: DEDUCTION OF DEBTS.** See Insurance, 14.
9. **IN AID OF RAILROADS.** See Railroads, 2-5.

TAXES.

1. **SALE OF LAND FOR.** See Tax Sale and Deed.
2. **COLLECTED AND PAID BY MISTAKE: RECOVERY.** See Tax Sale and Deed, 7, 8, 10.
3. **IN AID OF RAILWAYS.** See Railroads, 2-5.

TAX SALE AND DEED.

1. **FOR DELINQUENT PERSONAL TAXES NOT CARRIED FORWARD: ENTRIES IN BOOK NOT KNOWN TO LAW.** Certain delinquent taxes upon personal property were not carried forward on the regular tax lists, as provided by section 845 of the Code, but were entered by the treasurer in a separate book which he kept for the purpose, but which was unknown to the law. Afterwards the person who was liable for the taxes sold to plaintiffs, who had no actual knowledge or notice of such taxes, certain land on which they would have been a lien had they been properly carried forward. *Held* that the entries in the book above referred to, did not impart constructive notice to plaintiffs of its contents, and that a subsequent sale of the land for such taxes was void. *Dows v. Dale*, 108.
2. **WHEN NOTICE TO REDEEM NOT NECESSARY.** When land has been sold for taxes, and at the time of giving notice to redeem it is taxed to an unknown owner, and no one is in possession, the purchaser is entitled to a deed without notice. (*Meredith v. Phelps*, 65 Iowa, 118, *followed*). *Griffin v. Tuttle*, 219.
3. **ASSESSMENT TO UNKNOWN OWNER: WHAT SUFFICIENT.** (*Burdick v. Connell*, 69 Iowa, 458, *followed*). *Id.*
4. **NOTICE TO REDEEM: TO WHOM LAND TAXED.** When the taxes on land sold for taxes have not yet been levied for the year in which notice to redeem is given, but the land has been assessed to the unknown owner, and the assessor's book returned to the auditor, the land is then taxed to the unknown owner, in contemplation of the statute requiring notice to be given to the person to whom it is taxed. (Compare *Heaton v. Knight*, 63 Iowa, 686, and 65 Iowa, 484). *Id.*

5. **SALE FOR LESS THAN TAXES DUE.** A tax deed is not void on its face because it shows that the land was sold for less than the whole amount of the taxes due, for such sale is not unlawful (Laws of 1876, chap. 79), and the deed is presumptive evidence that the sale was lawfully made. . *Id.*
6. **RIGHTS BASED THEREON: STATUTE OF LIMITATIONS.** The statute of limitations begins to run against a purchaser at tax sale at the time when he might obtain a deed; i. e., three years after the date of sale; and after five years from the time it begins to run, not only is the tax title extinguished, but all rights which are dependent upon it. (See cases cited in opinion). *LaRue v. King*, 288.
7. **FAILURE OF TITLE: RECOVERY OF TAXES: STATUTE OF LIMITATIONS.** One who bids off land for taxes, and pays subsequent taxes thereon, but fails to get title to the land, cannot recover of the owner the taxes so paid by him after five years from the date of payment. (Compare *Sexton v. Peck*, 48 Iowa, 251; *Brown v. Painter*, 44 Iowa, 368). *Id.*
8. ———: ———; **WHEN NOT ALLOWED.** Where one bids off at tax sale school lands which have been sold on credit, and pays subsequent taxes thereon, and afterwards the land is sold upon a foreclosure of the school-fund mortgage, he cannot recover the taxes paid by him of the purchaser at the foreclosure sale, because, the taxes having been paid before such purchaser obtained title, there can be no presumption that they were paid at his request. (*Goodnow v. Moulton*, 51 Iowa, 555, and *Fogg v. Holcomb*, 64 Iowa, 621, distinguished). *Id.*
9. **PRIOR PAYMENT OF TAX: EVIDENCE.** The evidence in this case, consisting of an imperfect stub of a tax receipt and other evidence (see opinion), considered, and held to show that the tax for which the land in question was sold had been paid prior to the sale. *Buck v. Holt*, 294.
10. **WRONGFUL SALE: RECOVERY OF TAXES PAID.** One who in good faith purchases land at tax sale, and procures a tax deed which is valid on its face, and afterwards pays taxes on the land, may recover such taxes from the owner, when he has the tax deed set aside in a court of equity on the ground that no taxes were due on the land when it was sold; and such taxes will be made a lien on the land in such equitable action. (Compare *Gardner v. Early*, 69 Iowa, 45). *Id.*
11. **REDEMPTION IN EQUITY: CLAIM FOR IMPROVEMENTS: PRACTICE.** Under Code, section 893, in actions for the redemption of land sold for taxes begun after the delivery of the treasurer's deed, the court must determine claims for improvements made on the land by the person claiming under the tax deed. (*Fogg v. Holcomb*, 64 Iowa, 627, distinguished). *Serrin v. Brush*, 489.
12. ———: ———: **COSTS.** In such case, where the land belonged to a minor at the time of sale, and the action was brought by those who inherited it from him, and all the costs made on the part of plaintiffs were incurred in the establishment of their right to redeem, and all those on the part of defendants were incurred in establishing their claim for improvements, as to which claim they succeeded, held that the court did not err in taxing all the costs to plaintiffs. (*Springer v. Bartle*, 46 Iowa, 688, and *Broquet v. Sterling*, 56 Iowa, 358, distinguished). *Id.*
13. **TO AGENT OF OWNER: TITLE OF BONA-FIDE GRANTEE.** Although an agent cannot acquire a valid tax title to the lands of his principal, yet, where he thus acquires the legal title, a purchaser from him in good faith and for value will be protected against the equities of the principal. *Lamb v. Davis*, 719.

14. ——— : WHO IS AGENT. Where a friend of the non-resident owner of land volunteered to pay the taxes with his own money, expecting to be reimbursed, but the owner neglected to reimburse him when requested so to do, *held* that he was in no sense the agent of the owner for the payment of the taxes, and that he had the same right as any other person to bid in the land for subsequent unpaid taxes, and to take a treasurer's deed therefor, and that he was not liable to account to the former owner for the land or its proceeds. *Id.*
15. SALE TO ONE NOT PRESENT : TITLE OF SUBSEQUENT GRANTEE. Where the purchaser of land at tax sale was not present at the sale either in person or by agent, but the land was stricken off to him in pursuance of a secret arrangement between himself and the treasurer, but without fraud, *held* that the sale was not void, but that, on account of the irregularity, he might have been divested of all interest in the property by proper proceedings while he held the title; but that he was not liable as a trustee of the land or of the proceeds of the sale of it; and that a good-faith purchaser for value from him could not be disturbed in his title on account thereof. *Id.*

See SCHOOL LANDS, 1.

TENANT IN COMMON.

See ADVERSE POSSESSION, 2.

TENDER.

See CONTRACT, 5; PLEADING, 3.

TITLE TO LAND.

See ADVERSE POSSESSION; OCCUPYING CLAIMANT, 1; TAX SALE AND DEED, *passim*.

TOWNSHIP TRUSTEES.

See PAUPERS, 1; TAXATION, 1, 3, 6.

TRIAL.

PLACE OF. See Venue.

TRIAL BY JURY.

See JURY TRIAL.

TRIAL DE NOVO.

See PRACTICE IN SUPREME COURT, 6, 7, 9, 10, 47.

TRUSTS.

1. UNINCORPORATED CHURCH : TRUSTEE OF LAND FOR USE OF : REMOVAL ON PETITION OF MEMBERS. Three out of several hundred members of an unincorporated church have no right to ask the removal of a trustee to whom property has been conveyed for the use of the church, especially where it is not shown that the property will be impaired or the rights of the beneficiaries imperiled. *Determann v. Luehrsmann*, 275.
2. ——— : RIGHT TO RENTS. In such case the trustee is entitled to the rent of the trust property. *Id.*

3. **DEED OF LAND : CONDITION BROKEN : REVERSION.** Land was conveyed to trustees for certain purposes and upon certain conditions, upon the failure of which it was to be sold, and a part of the proceeds, or, in a certain contingency, all of them, were to go to the heirs of the grantor. *Held* that, upon a failure of the purposes and conditions, the sale and distribution of the proceeds were to be made by the trustees, and that the heirs were not entitled to recover the possession of the property. *Butterfield v. Wilton Academy*, 515.

See JUDICIAL SALE, 2; WILLS, 10.

VENDOR AND VENDEE.

1. **NOTICE OF PRIOR TITLE : POSSESSION : WHAT SUFFICIENT.** A purchaser of land is charged with notice of the rights of a prior purchaser from his grantor, even though the prior deed is not on record, if the prior purchaser is in possession of the land; and in this case *held* that the fact that the prior purchaser had enclosed the land with furrows, some of which were within its boundary line, some upon that line, and some outside, and that such furrows were easily seen and their existence a matter of notoriety in the neighborhood, was such possession as to charge the subsequent purchaser with notice of his rights. (See cases cited in opinion). *Buck v. Holt*, 294.
2. **FRAUDULENT MORTGAGE : DUTY TO RESIST.** Where a vendor quit-claims land, representing that a recorded mortgage thereon is a forgery, and it is a forgery, and the vendee, in a subsequent action to foreclose the mortgage, neglects to plead the forgery, and thus allows his title to be impaired, he cannot recover of his vendor. *Everling v. Holcomb*, 722.
3. **INDUCEMENT : MISREPRESENTATIONS OF AGENT.** Representations made by an agent of the vendor after the sale has been consummated, and when he is no longer acting for the vendor in the matter, are no ground of action against the vendor. *Id.*
4. **FRAUD : CONCEALMENT OF MORTGAGE : EVIDENCE.** In an action for fraud in the sale of real estate, where the only question was whether defendant had concealed the fact that the land was mortgaged, and had represented that he had a perfect title, *held* that evidence that he had purchased the land only a short time before for much less than its market value was not relevant. *Id.*
5. **——— : ——— : MEASURE OF DAMAGES.** Where a vendor fraudulently conceals a mortgage on land conveyed, the vendee's measure of damages is not the market value of the land, but only the amount necessary to redeem from the mortgage, together with costs, where he has properly allowed it to be foreclosed. *Id.*

See ADVERSE POSSESSION, 3; FORMER ADJUDICATION, 8; TAX SALE AND DEED, 1.

VENUE.

1. **SUIT AT WRONG PLACE AS TO TWO OF FIVE COUNTS : CHANGE OF VENUE : EXPENSES.** This action, in five counts, was brought in the district court at Avoca, but the court would have had no jurisdiction at that place (it not being the county-seat) of the causes of action set up in two of the counts, had they stood alone. Defendants moved that as to these two counts the cause be removed to Council Bluffs, which was the county-seat and the place of their residence, and that they be allowed compensation for trouble and expense in attending at the wrong place. *Held* that the motion was properly overruled on both points, and that their proper remedy, if they were not willing to try the whole case at Avoca, was to move to strike out those counts of which the court had no jurisdiction. *Davis v. Kimball*, 84.

2. **CHANGE OF : PREJUDICE OF COUNTY : DISCRETION OF COURT.** Where a change of venue was asked on the ground of the prejudice of the inhabitants, and supported by the affidavits of forty-six persons, and resisted by the affidavits of seventy-three persons, *held* that there was no abuse of the court's discretion in overruling the application. *State v. Stewart*, 836.
3. **—— : COUNTY A PARTY : WHEN NOT.** A change of venue cannot be demanded, under section 2590 of the Code, in an action upon a forfeited recognizance of one charged with a crime, on the ground that the action is for the benefit of the school fund, and that, therefore, the county is the real party in interest. (Compare *State v. Merryhew*, 47 Iowa, 114). *Id.*

VERDICT.

1. **EFFECT OF STATEMENTS MADE BY BAILIFF IN JURY-ROOM : PRACTICE : AFFIDAVIT OF JUROR.** Defendant sought to have the verdict against him set aside on the ground that one of the jurors was induced to consent to it, against his judgment, by statements made by the bailiff in the jury-room. *Held* (1) that the affidavit of the juror was not competent to show that his verdict was influenced by the alleged statement (*Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa, 195, 210); and (2) that, since the alleged statements, if made, were not such as, under the facts of the case, might reasonably be supposed to have influenced one or more of the jurors in making up the verdict, the court did not err in refusing to set the verdict aside on account thereof. *State v. Cowan*, 53.
2. **INDEFINITE ANSWERS TO SPECIAL INTERROGATORIES.** Where the evidence is insufficient to enable the jury to answer special interrogatories in the affirmative, negative answers should be given in clear and decided language, and where such answers are so uncertain and evasive that it cannot be determined whether they accord or conflict with the general verdict, they ought not to be allowed to stand. (See opinion for illustrations). *Fisk v. Chicago, M. & St. P. Ry. Co.*, 424.
3. **SETTING ASIDE : AFFIDAVITS OF JURORS : FACTS INHERING, AND NOT INHERING, IN VERDICT.** A verdict cannot be set aside upon the affidavits of jurors, showing that they were unduly influenced by a fellow-juror; for such fact inheres in the verdict. (See cases cited in opinion). But where a juror, upon what he alleges to be his own personal knowledge, testifies in the jury-room to facts bearing directly upon the issue involved, *held* that such misconduct may be shown by the affidavits of jurors, and is good ground for setting aside the verdict. (See opinion for authorities followed and distinguished.). *Griffin v. Harriman*, 436.
4. **AVERAGE : AFTERWARDS AGREED TO.** Where each juror states the amount which he thinks plaintiff ought to recover, and the sum of these amounts is divided by the number of jurors, and the result is afterwards agreed to as the amount of the verdict, *held* that it is valid. (See *Hamilton v. Des Moines Valley Ry. Co.*, 86 Iowa, 85). *Sullens v. Chicago, R. I. & P. Ry. Co.*, 659.
5. **EVIDENCE TO SUPPORT.** In this action (for money loaned) the evidence is considered (see opinion), and, while conflicting, *held* sufficient to support the verdict against defendant. *Miles v. Wikel*, 712.
6. **GENERAL AND SPECIAL : CONFLICT.** A special verdict that defendant had borrowed a certain sum, and a general verdict for a larger sum, cannot be said to be in conflict, where the difference is the interest on the amount borrowed. *Id.*

INDEX.

7. FAILURE TO ANSWER SPECIAL INTERROGATORY: NO PREJUDICE. A failure to answer a part of a special interrogatory is no ground for reversal where, from the verdict found, it is clear that the answer, if given, would have been immaterial. *Id.*
8. IN JURY CASES. See Criminal Law, 28, 29, 63.
9. SPECIAL VERDICT. See Juries and Jury, 1.

See REPLEVIN, 2.

VOLUNTARY ASSOCIATIONS.

See TESTS, 1.

WARRANTY.

See WARRANTY CASES IN INSURANCE, 10.

See WARRANTY CASES IN INSURANCE, 11.

See WARRANTS, 1.

WARRANTS FOR THE ARREST.

See WARRANTS, 1.

See WARRANTS, 1.

See WARRANTS FOR THE ARREST OF THE DEFENDANT IN CRIMINAL CASES, 1.

See WARRANTS FOR THE ARREST OF THE DEFENDANT IN CRIMINAL CASES, 2.

See WARRANTS FOR THE ARREST OF THE DEFENDANT IN CRIMINAL CASES, 3.

See WARRANTS FOR THE ARREST OF THE DEFENDANT IN CRIMINAL CASES, 4.

5. ——— : **EXPERT TESTIMONY : HYPOTHETICAL QUESTIONS.** Hypothetical questions put to experts should be based upon facts which the evidence tends to prove. It is not required that they should be based upon conceded facts ; nor is technical accuracy required in framing the questions. (For application of rule, see opinion). *Id.*
6. ——— : **DEFINITION.** A person of sufficient capacity to make a will is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty ; but it is not necessary that he should have sufficient capacity to make contracts, and do business generally, nor to engage in complex and intricate business matters. (Compare *Bates v. Bates*, 27 Iowa, 110 ; *Will of Convey*, 52 Iowa, 197). *Id.*
7. ——— : **EXPERT TESTIMONY : WEIGHT OF.** Where the capacity of the testator was questioned, the court instructed that in such cases the testimony of medical men of large experience is, as a general rule, entitled to more weight than that of unprofessional men, but that it was still a question for the jury whether the expert testimony in the case should have more weight than that of the other witnesses. *Held* that the instruction was correct, in view of the fact that the experts were two on each side, and that these had each made a personal examination of the testator for the very purpose of ascertaining his mental capacity. *Id.*
8. **PROBATE : CONTEST : PROBATE REFUSED : COSTS.** It is the duty of an executor to probate the will, and he should not, in the absence of a showing of bad faith, be held personally liable for the costs. And in this case, where the executors and others proposed the will for probate, but it was contested on the grounds of undue influence and incapacity, and there was a general verdict for the contestants, *held* that a motion to tax all the costs, excepting the fees of the witnesses to the will, to the proponents, was properly overruled. *Id.*
9. **CONSTRUCTION : REPUGNANT CLAUSES.** The will in question was as follows : "J. W. gives all his property * * * in care and power of his wife Dorothea, to do with said property to her best will, on condition that said Dorothea shall be bound and shall take care and see that, of the property left, she, as mother, shall get one-third, and each of the children * * * shall also have one-third as their own property. In case the said Dorothea should never marry again, then said Dorothea shall have full power and the right to use the interest of the said property for her own proper use and the use of the children. After the decease of said Dorothea, then the whole property left shall go to my children, J. J. W. and G. G. W." *Held*—
 - (1) That the widow and each of the children took one-third in fee.
 - (2) That the last clause, intending to direct the descent of the property after the death of the widow, was void, because repugnant to the absolute bequest of one-third to her. (Compare *Rona v. Meier*, 47 Iowa, 607). *Killmer v. Wuchner*, 859.

7. **FAILURE TO ANSWER SPECIAL INTERROGATORY : NO PREJUDICE.** A failure to answer a part of a special interrogatory is no ground for reversal where, from the verdict found, it is clear that the answer, if given, would have been immaterial. *Id.*
8. **IN CRIMINAL CASES.** See Criminal Law, 28, 29, 63.
9. **SPECIAL VERDICT.** See Jurors and Jury, 1.

See REPLEVIN, 2.

VOLUNTARY ASSOCIATIONS.

See TRUSTS, 1.

WARRANTY.

1. **OF OWNERSHIP : BREACH.** See Insurance, 8, 12.
2. **AGAINST INCUMBRANCE : BREACH.** See Insurance, 11.

See SALES, 5-8.

WATER AND WATER-COURSES.

See RAILROADS, 16-19.

WILLS.

1. **DISINHERITING HEIR.** Ever since the enactment of the Code of 1851, a testator in this state has had the right to dispose of his property by will as he pleased, and an heir to whom nothing is devised takes nothing. *Stennett v. Hall*, 279.
2. **INTERPRETATION : BEQUEST TO ONE DECEASED.** The will in question, among other bequests, made the following : "(3) To my son W. forty-five dollars in excess of an equal share : said forty-five dollars is to taken E.'s share. (4) To my daughter E. fifty dollars, forty-five dollars of which is to go to W. for marble headstone, she having had consideration in advance." E. was dead when the will was made, and the testator knew that fact. *Held* that the bequest to her was void, and that the amount thereof was to be distributed to the other heirs, except the sum of forty-five dollars, which sum W. was to expend for a head-stone for E. *Id.*
3. **CAPACITY TO MAKE : EVIDENCE : OPINIONS OF NEIGHBORS.** There must of necessity be expressions of opinions by witnesses in regard to the appearance, conversation and acts of one whose mental capacity is brought in question. (Compare *Yahn v. City of Ottumwa*, 60 Iowa, 429). And so, in this case, where it was sought to show the incapacity of the testator, *held* that the following questions addressed to witnesses who were his neighbors and acquaintances were properly allowed : "How was his appearance? What makes you think he did not know you on this day? Do you mean that his mind was simply weakened, or that it was impaired in some of its faculties? Did he get worse or better up to the last time you saw him? You may state whether he could or could not hold a conversation—an extended conversation." *Meeker v. Meeker*, 352.
4. **——— : ——— : INDIFFERENCE TO CONVERSATIONS.** In such case, evidence was properly admitted of conversations held in the testator's presence which would naturally call for some response from him, and that he remained silent, without proof that he heard them ; no proof being made that his hearing was defective. *Id.*

5. ——— : **EXPERT TESTIMONY : HYPOTHETICAL QUESTIONS.** Hypothetical questions put to experts should be based upon facts which the evidence tends to prove. It is not required that they should be based upon conceded facts ; nor is technical accuracy required in framing the questions. (For application of rule, see opinion). *Id.*

6. ——— : **DEFINITION.** A person of sufficient capacity to make a will is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty ; but it is not necessary that he should have sufficient capacity to make contracts, and do business generally, nor to engage in complex and intricate business matters. (Compare *Bates v. Bates*, 27 Iowa, 110 ; *Will of Convey*, 52 Iowa, 197). *Id.*

7. ——— : **EXPERT TESTIMONY : WEIGHT OF.** Where the capacity of the testator was questioned, the court instructed that in such cases the testimony of medical men of large experience is, as a general rule, entitled to more weight than that of unprofessional men, but that it was still a question for the jury whether the expert testimony in the case should have more weight than that of the other witnesses. *Held* that the instruction was correct, in view of the fact that the experts were two on each side, and that these had each made a personal examination of the testator for the very purpose of ascertaining his mental capacity. *Id.*

8. **PROBATE : CONTEST : PROBATE REFUSED : COSTS.** It is the duty of an executor to probate the will, and he should not, in the absence of a showing of bad faith, be held personally liable for the costs. And in this case, where the executors and others proposed the will for probate, but it was contested on the grounds of undue influence and incapacity, and there was a general verdict for the contestants, *held* that a motion to tax all the costs, excepting the fees of the witnesses to the will, to the proponents, was properly overruled. *Id.*

9. **CONSTRUCTION : REPUGNANT CLAUSES.** The will in question was as follows: "J. W. gives all his property * * * in care and power of his wife Dorothea, to do with said property to her best will, on condition that said Dorothea shall be bound and shall take care and see that, of the property left, she, as mother, shall get one-third, and each of the children * * * shall also have one-third as their own property. In case the said Dorothea should never marry again, then said Dorothea shall have full power and the right to use the interest of the said property for her own proper use and the use of the children. After the decease of said Dorothea, then the whole property left shall go to my children, J. J. W. and G. G. W." *Held*—
 - (1) That the widow and each of the children took one-third in fee.
 - (2) That the last clause, intending to direct the descent of the property after the death of the widow, was void, because repugnant to the absolute bequest of one-third to her. (Compare *Rona v. Meier*, 47 Iowa, 607). *Killmer v. Wuchner*, 859.

10. **POWERS CONFERRED ON EXECUTORS : PERSONAL TRUST.** A resident of the state of Illinois made a will and named G. and V., residents of that state, as his executors, and after his death they qualified as such in that state. In a codicil he devised certain lands in Iowa to "my executors in said will named, in trust for the following purposes: It is my will, and I hereby give said executors power to sell and convey said land * * * whenever they shall think it advisable to do so." The trust was for the benefit of the widow and children of a deceased son. G. and V. did not sell the land, and the appellant caused the will to be filed in the county in which the land lies, and served notice on the executors to qualify in Iowa and execute the will. This they failed to do, and he was appointed administrator in Iowa, and as such filed a petition to sell the land and distribute the proceeds as provided in the will, on the ground that the interest of the beneficiaries, and the will itself, required that this should be done. *Held* that the petition was properly denied, because the power to sell was given, not to executors in general, but only to G. and V., in whom the testator reposed special trust and confidence, and who had not renounced the trust, nor refused to execute it when in their judgment it would be advisable to do so. (*Lees v. Wetmore*, 58 Iowa, 170, *distinguished*; and *Hodgin v. Toder*, 70 Iowa, 21, *followed in principle*). *In re Van Brocklin's Est.* 412.
11. **PROBATE : CONTEST : CONCLUSIVENESS OF JUDGMENT.** Since the enactment of chapter eleven, Laws of 1876, giving the right to a trial by jury in cases where the proving of a will is contested, the judgment in such cases is conclusive upon the parties. And in this case, where plaintiffs appeared when the will was offered for probate, and made their contest, and had a full trial, with the right to demand a jury, which they waived, *held* that they cannot now institute an original proceeding, and try again the identical questions which have been adjudicated against them. (*Leighton v. Orr*, 44 Iowa, 680, and *Gilruth v. Gilruth*, 40 Iowa, 348, *distinguished*). *Smith v. James*, 462.
12. **PROBATE : ONLY ONE WITNESS : TWO WITNESSES TO CODICIL.** The will offered for probate in this case was attested in due form by two witnesses, but one of them was incompetent. A codicil was afterwards added on the same sheet of paper, which referred to the will, and stated that it was to be taken as a part thereof; and the codicil was duly attested by two competent witnesses. *Held* that the due execution and proof of the codicil met all the requirements of the statute as to the original will, and that both must be considered as one instrument. *In re Will of Murfield*, 479.
13. **UNDUE INFLUENCE : EVIDENCE.** In a proceeding to prove a will, where it was claimed that a son came from Kansas to influence the mind of the testator, it was proper to admit evidence having a tendency to show that his coming had another purpose. *Blake v. Rourke*, 519.
14. ——— : **SUGGESTION OF SCRIVENER.** Where the testator deeded land to his wife, and on the same day, and as a part of the same transaction of disposing of his property, he also, at the suggestion of his scrivener, devised to his wife the same land, *held* that this fact tended to show neither undue influence nor a want of testamentary capacity. *Id.*
15. **INCAPACITY : BURDEN OF PROOF.** Where the evidence showed only temporary mental derangement of the testator's mind, and that at times when he suffered from paroxysms of pain, it was incumbent on the contestants of the will to show that it was executed during one of such paroxysms. *Id.*

16. ———: OPINIONS OF NON-EXPERTS. Non-expert witnesses cannot be allowed to give an opinion as to the mental condition of a testator on the day the will was made, when they did not see him, and could not testify to his condition on that day. *Id.*
17. ———: RELATIVE WEIGHT OF OPINIONS OF EXPERTS. The testimony of medical men of experience in such matters, given after a careful examination of the testator's mental condition, may properly be allowed more weight and consideration by the jury than that of non-professional witnesses. *Id.*
13. CONSTRUCTION: APPLICATION OF ASSETS TO PAYMENT OF DEBTS. On the petition of the executor certain provisions of a will, which relate to the application of the assets to the payment of the debts, are construed. (See opinion for will and decree construing same). *Watkins v. Jenkins*, 749.

WITNESSES.

1. USE OF. See Costs, 1.
2. RIGHT OF ACCUSED TO BE CONFRONTED WITH. See Criminal Law, 6.
3. IMPEACHMENT OF. See Evidence, 24, 25.
4. TO WILLS. See Wills, 12.

WORDS AND PHRASES.

"DUE." See Chattel Mortgage, 2, subd. 2.

WRIT OF ERROR.

See PRACTICE AND PROCEDURE, 2.

Ex. J. P.

